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SUPREME COURT DECISIONS

Kaupp v. Texas, 123 S.Ct. 1843 (2003).

After a 14 year old girl disappeared in January of 1999, the Harris County Sheriff's Department learned that she had a sexual relationship with her 19-year-old half-brother, who had been in the company of Robert Kaupp on the day of her disappearance. Officers then questioned the half-brother and Kaupp. Kaupp was permitted to leave the interview after passing a polygraph examination in which he denied any involvement in the girl's disappearance. In contrast, the half-brother was detained after he failed a polygraph examination. Eventually, the half-brother confessed that he fatally stabbed the girl and threw her body in a drainage ditch. The half-brother also implicated Kaupp in the killing.

The detectives were unable to procure an arrest warrant for Kaupp because they believed that they lacked probable cause. Nevertheless, the detectives decided to "get Kaupp in and confront him with what the half-brother had said." Consequently, six officers traveled to Kaupp's house at 3:00 A.M. After Kaupp's father let them in, at least three officers went to Kaupp's bedroom, woke him,

and told him, "we need to go and talk." Kaupp simply replied "Okay."

Kaupp was then handcuffed and lead out of the house to an awaiting patrol car. When he was lead from the house, Kaupp was not wearing shoes and was clad only in boxer shorts and a tee shirt. In anticipation of confronting Kaupp with the half-brother's confession, the officers drove Kaupp to the location where the girl's body was found. Kaupp was eventually taken to the police station where he was placed in an interview room, advised of his *Miranda* rights, and his handcuffs were removed.

Kaupp first denied any involvement in the homicide. However, 10 to 15 minutes into the interrogation, Kaupp was informed of the half-brother's confession and admitted his role in the crime.

After being indicted, Kaupp attempted to suppress his confession as the fruit of an illegal arrest. However, Kaupp was: unsuccessful in suppressing his confession, convicted of the crime, and sentenced to a lengthy term of imprisonment. Kaupp was unsuccessful on direct appeal and the United States Supreme Court granted *certiorari*.

A seizure of a person within the meaning of the 4th and 14th Amendments occurs when "taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." It is true that the Supreme Court has permitted seizures based on evidence that

did not rise to the level of probable cause—*i.e.*, *Terry* stops. However, the Court has never “sustained, against 4th Amendment challenge, the involuntary removal of a suspect from his home to a police station and his detention there for investigative purposes absent probable cause or judicial authorization.”

The Court found that the facts of this case clearly showed that Kaupp was arrested. When Kaupp was removed from his house he was: wearing handcuffs but not shoes; dressed in his underwear; placed in a patrol car; driven to the scene of a crime and then to the sheriff’s office; and taken into an interrogation room and questioned. Importantly, Kaupp’s arrest was effectuated without either prior judicial authorization or probable cause.

Kaupp’s response, “Okay,” to the detective’s statement that “we need to go and talk” did not demonstrate that he consented to the procedure. Instead, the officers offered Kaupp “no alternative but to go.” The Court concluded that Kaupp’s response was nothing more than a “mere submission to a claim of lawful authority.”

Because Kaupp was arrested before he was questioned, established Supreme Court precedent required suppression of his confession unless that confession was an “act of free will sufficient to purge the primary taint of the unlawful invasion.” In making this determination, relevant considerations include: “whether *Miranda* warnings were given, the temporal proximity of the arrest and the confession, the presence of intervening circumstances, and particularly the purpose and flagrancy of the official misconduct.”

In evaluating these factors, the only one that militated in Texas’ favor was that Kaupp was given *Miranda* warnings. However, “*Miranda*, alone and *per se*, cannot always break, for 4th Amendment purposes, the causal connection between the illegality and the confession.” The Court resolved the remaining factors in Kaupp’s favor. Accordingly, the judgment of the Texas Court of Appeals was vacated and the case was remanded for further hearing consistent with the Court’s opinion.

Bunkley v. Florida, —S.Ct.—, 2003 WL 21210417 (2003).

In 1986, Bunkley burglarized a restaurant and he was arrested as he was leaving. At the time of Bunkley’s arrest officers discovered a pocketknife with a 2-1/2 to 3 inch blade that was folded in his pocket. There was no evidence that Bunkley either used the pocketknife during the burglary or that he threatened anyone with the knife.

Nonetheless, Bunkley was charged with burglary in the first degree because he was armed with a “dangerous weapon”—the pocketknife. The punishment for burglary in the first degree is a sentence of up to life in prison. However, if the pocketknife was not classified as a “dangerous weapon,” Bunkley would have been charged with burglary in the third degree which is punishable by a term of imprisonment of up to five years.

Bunkley was convicted of burglary in the first degree and sentenced to life in prison. In 1989, a Florida appellate court affirmed Bunkley’s conviction and sentence.

Under Florida law, the “common pocketknife” had been exempted from its weapons statute since 1901. In 1997, the Florida Supreme Court interpreted the meaning of the “common pocketknife” exemption and ruled that a 3-3/4 inch blade “plainly falls within the statutory exception to the definition of ‘weapon’ found in Florida law.” Accordingly, the Florida Supreme Court vacated the conviction of that individual because the 3-3/4 inch knife was a “common pocketknife.”

After the Florida Supreme Court’s decision was announced in 1997, Bunkley filed a motion for post-conviction relief. Bunkley alleged that under Florida law in 1986, his pocketknife could not have been considered to be a “dangerous weapon.” Consequently, Bunkley maintained that his conviction for armed burglary was invalid and should be vacated.

Bunkley was unsuccessful in his state court litigation and the Florida Supreme Court ruled that its 1997 decision did not apply retroactively to Bunkley’s case. The court also held that the decision announced in *Fiore v. White*, 531 U.S. 225 (2001) did not apply to Bunkley’s case.

Fiore was convicted of violating a Pennsylvania environmental statute which the Pennsylvania Supreme Court interpreted for the first time after his conviction became final. Under the Pennsylvania Supreme Court's interpretation of the statute, Fiore could not have been convicted of the crime for which he stood convicted.

In *Fiore*, the United States Supreme Court found that because Pennsylvania law, as interpreted by the Pennsylvania Supreme Court's decision, made it clear that Fiore's conduct did not violate an element of the statute, his conviction did not satisfy the strictures of due process. Consequently, even though Fiore's conviction was final when the Pennsylvania Supreme Court announced its decision, the United States Supreme Court applied due process concepts and reversed his conviction. The Court ruled that retroactivity was not even an issue.

The Court applied the *Fiore* holding to Bunkley's case and held that retroactivity was not an issue in the case *sub judice* if the Florida Supreme Court's interpretation of the common "pocketknife exception" was a correct statement of the law before Bunkley's conviction became final. However, based on the record in this case, this was a question that the United States Supreme Court was unable to answer. Accordingly, the Court remanded this case to the Florida Supreme Court for determination of whether, at the time that Bunkley's conviction became final, the "common pocketknife" exemption to the statute existed.

Chavez v. Martinez, —S.Ct.—, 2003 WL 21210419 (2003).

In 1997, police officers from Oxnard, California were investigating suspected narcotics activity. While Officers Peã and Salinas were questioning an individual, they heard a bicycle approaching. They ordered the rider, Martinez, to dismount, spread his legs, and place his hands behind his head.

Martinez complied and Officer Salinas then conducted a pat down frisk and discovered a knife in Martinez's waistband. An altercation between the officers and Martinez ensued. The parties differed wildly on what happened during this altercation. Nonetheless, Officer Peã drew her gun and

shot Martinez several times, causing severe injuries that left Martinez permanently blinded and paralyzed from the waist down.

Martinez was arrested and Officer Chavez soon arrived on the scene with paramedics. Chavez accompanied Martinez to the hospital and then questioned Martinez while he was receiving treatment. Over a 45 minute period, Chavez interviewed Martinez for approximately 10 minutes, with Chavez periodically leaving the emergency room to permit medical personnel to attend to Martinez.

During the interview, Martinez admitted that he took Officer Peã's gun and pointed it at the police. At one point during the interview, Martinez said "I'm not telling you anything until you treat me," yet Chavez continued the interview. At no point did Chavez apprise Martinez of his *Miranda* rights.

Martinez was never charged with a crime and his answers were never used against him in any criminal prosecution. Nevertheless, Martinez filed a § 1983 action maintaining that Chavez's actions violated his 5th Amendment privilege against self-incrimination as well as his 14th Amendment substantive due process right to be free from coercive questioning.

The district court found that Chavez violated Martinez's constitutional rights; Chavez was not entitled to the protection of the doctrine of qualified immunity; and Martinez was entitled to summary judgment. Chavez appealed to the 9th Circuit which affirmed the district court's denial of qualified immunity. The 9th Circuit found that Chavez violated Martinez's constitutional rights because the "5th Amendment's purpose is to prevent coercive interrogation practices that are destructive of human dignity." The United States Supreme Court granted *certiorari*.

In deciding whether a police officer is entitled to qualified immunity protection, a court must determine whether the officer's conduct violated a constitutional right. If a constitutional right was not violated, the officer is entitled to qualified immunity and there is no requirement to consider whether the asserted constitutional right was "clearly

established.”

The 5th Amendment, in pertinent part, provides that “no person . . . shall be compelled in any criminal case to be a witness against himself.” The Supreme Court found, based on the express purpose of the 5th Amendment, Martinez could not allege a violation of this right because he was never prosecuted for a crime, let alone compelled to be a witness against himself in a criminal case.

With that said, the Court was quick to state that “our views on the proper scope of the 5th Amendment’s Self-Incrimination Clause do not mean that police torture or other abuse that results in a confession is constitutionally permissible so long as the statements are not used at trial; it simply means that the 14th Amendment’s Due Process Clause, rather than the 5th Amendment’s Self-Incrimination Clause, would govern the inquiry in those cases and provide relief in appropriate circumstances.”

Next, the Court examined Martinez’s 14th Amendment due process claim. The Court ruled that Chavez’s questioning did not violate Martinez’s due process rights. In order to violate the Due Process Clause, the officer’s conduct must “shock the conscience.” The Court held that there was no evidence that Chavez acted with the purpose to harm Martinez by intentionally interfering with his medical treatment. The medical personnel were able to treat Martinez throughout the interview and Chavez ceased questioning to allow tests for medical procedures to be performed. Because Chavez did not violate either of Martinez’s 5th or 14th rights, he was entitled to qualified immunity. Accordingly, judgment in the 9th Circuit was reversed.

Price v. Vincent, 123 S.Ct. 1848 (2003).

An altercation between youths at a high school in Flint, Michigan resulted in Markeis Jones being shot and killed. Vincent was arrested in connection with the shooting and charged with first-degree murder. At the close of the prosecution’s case-in-chief, and outside of the hearing of the jury, defense counsel moved for a directed verdict of acquittal as to the first-degree murder charge.

The trial judge stated “my impression at this time is that there’s not been shown premeditation or planning in the, in the alleged slaying. That what we have at the very best is second-degree murder. . . I think that second-degree murder is an appropriate charge. . .”

Before court adjourned, the prosecutor stated that he wanted to address the court’s ruling the following morning and the trial judge agreed. The next day, defense counsel objected to the prosecutor’s argument and maintained that the trial court had granted Vincent’s motion for a directed verdict the previous day. Vincent maintained that to allow the first-degree murder charge to be presented to the jury for deliberation would violate the Double Jeopardy Clause.

The trial judge responded that “I granted a motion but I have not directed a verdict.” Moreover, the judge noted that the jury had not been informed of his comments. After reflecting on the issue further, the judge decided to permit the charge of first-degree murder to be submitted to the jury.

The jury convicted Vincent of first-degree murder and the Michigan Court of Appeals reversed after concluding that the trial judge had directed a verdict and that the Double Jeopardy Clause prevented Vincent’s prosecution for first-degree murder. The Michigan Supreme Court cited to *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977) and reversed the Michigan Court of Appeals. The Michigan Supreme Court noted that “a judge’s characterization of a ruling, and the form of the ruling, may not be controlling for purposes of determining whether a ruling terminated jeopardy.” The Michigan Supreme Court concluded that the judge’s comments in this case were not sufficiently final to constitute a judgment of acquittal terminating jeopardy.

Vincent filed a § 2254 petition and the district court determined that his prosecution for first-degree murder violated the Double Jeopardy Clause. The 6th Circuit affirmed and the Supreme Court granted *certiorari*.

The double jeopardy claim in Vincent’s habeas petition arose out of the same set of facts upon which he based his direct appeal and the Michigan Supreme

Court's holding that no double jeopardy violation occurred. Consequently, there was an adjudication of this claim on its merits. Because the state court adjudicated this claim on its merits, under § 2254(d), Vincent was not entitled to habeas relief unless he could demonstrate that the Michigan Supreme Court's adjudication of his claim resulted in a decision that was: 1) contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or 2) based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

The 6th Circuit evaluated Vincent's double jeopardy claim using a *de novo* standard of review, rather than using the deferential standard set forth in § 2254(d). Moreover, the court did not consider whether the Michigan Supreme Court's decision was "contrary to" or an "unreasonable application of" Supreme Court precedent or whether it was based on an "unreasonable determination of the facts." As an initial observation, the Supreme Court noted that because this claim was adjudicated on its merits by the Michigan Supreme Court, the 6th Circuit erred by applying the *de novo* standard of review. Instead, the 6th Circuit was required to apply the deferential standard of review found in § 2254(d).

A decision by a state court is "contrary to" Supreme Court precedent if it "applies a rule that contradicts the governing law set forth in Supreme Court cases or if it confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court but nevertheless arrives at a result different from the Supreme Court." In this case, the Michigan Supreme Court identified and properly applied the relevant United States Supreme Court precedent (*Martin Linen Supply Co.*).

The Supreme Court also reviewed the opinion of the Michigan Supreme Court and found that it did not apply a legal standard that was contrary to those set forth in the relevant United States Supreme Court cases. Moreover, the Michigan Supreme Court did not confront a set of facts materially indistinguishable from those presented in any

of the United States Supreme Court's clearly established precedents.

The United States Supreme Court next reviewed whether Vincent met his burden of showing that the Michigan Supreme Court's decision involved an "unreasonable application of" clearly established law. This requires Vincent to show that the state court applied a Supreme Court precedent to his case in an "objectively unreasonable manner."

The United States Supreme Court reviewed the opinion of the Michigan Supreme Court and ruled that its adjudication of this case was not an "objectively unreasonable application of" clearly established law as defined by the United States Supreme Court. Because Vincent did not meet the statutory requirements for habeas relief, the judgment of the 6th Circuit was reversed.

Massaro v. United States, 123 S.Ct. 1690 (2003).

Massaro was indicted on federal racketeering charges in connection with the death of Joseph Fiorito. The day before Massaro's trial was to begin, a bullet was recovered from the car in which Fiorito's body was found; however, the prosecutor waited several days to inform defense counsel of this important discovery. Because of the delay in notifying defense counsel, the trial commenced and opening statements were given.

After being informed that the bullet was found, the district court offered to continue the trial to give defense counsel the opportunity to have the bullet examined by a ballistics expert. However, defense counsel declined the trial court's offer, the trial proceeded, and Massaro was convicted.

On direct appeal, Massaro's new lawyer argued that the district court erred in admitting the bullet into evidence; however, an ineffective assistance of trial counsel claim was not raised by appellate counsel. The 2nd Circuit affirmed Massaro's conviction.

Massaro then filed a § 2255 motion, to vacate his conviction. In his § 2255 motion, Massaro claimed that his trial counsel rendered ineffective assistance by failing to accept the district court's offer to continue the case and retain a ballistics expert to examine

the bullet. The district court ruled that this ineffective assistance claim was procedurally defaulted because Massaro did not raise it on direct appeal.

The 2nd Circuit affirmed, holding that when a defendant is represented by new counsel on appeal and when an ineffective assistance claim is based solely on the record made at the trial, the claim must be raised on direct appeal. New counsel's failure to raise the ineffective assistance claim on direct appeal resulted in a procedural default unless the petitioner showed both cause and prejudice for his failure to raise the claim.

The Supreme Court granted *certiorari* and ruled that ineffective assistance of counsel claims need not be raised on direct appeal even if new counsel is litigating the appeal and the basis for the claim is apparent from the trial record. Therefore, the Court carved out an exception to the general procedural default rule announced in *United States v. Frady*, 456 U.S. 152 (1982) wherein the Court held that claims not raised on direct appeal may not be raised on collateral review unless the petitioner shows both cause and prejudice. Accordingly, the judgment of the 2nd Circuit was reversed and the case was remanded.

Roell v. Withrow, 123 S.Ct. 1696 (2003).

Withrow is a Texas prisoner who filed a § 1983 action against members of the prison's medical staff alleging that they deliberately disregarded his medical needs in violation of the 8th Amendment. During a hearing before a magistrate judge to determine whether the suit could proceed *in forma pauperis*, the magistrate informed Withrow that he could choose to have her, rather than a district court judge, preside over his case.

Withrow agreed to have the magistrate preside. However, the attorney representing the three members of the medical staff (Roell, Garibay, and Reagan) informed the magistrate that she would have to "talk to the attorneys who have been assigned the case to see if the defendants will execute consent forms."

Without waiting for the defendants' decisions, the district court judge referred the case to the magistrate for final disposition. However, the district court added the caveat that "all defendants would be given an

opportunity to consent to jurisdiction of the magistrate judge and that the referral order would be vacated if any of the defendants did not consent."

The defendants were all served with a summons and the district court's referral order directing them to include "in their answer or in a separate pleading a statement" as to whether they would consent to disposition by a magistrate. Reagan, who was represented by private counsel, gave his written consent to the referral, however Garibay and Roell, who were represented by an assistant attorney general, filed answers that neglected to address the referral issue.

Nonetheless, the case proceeded in front of the magistrate all the way to a jury verdict and judgment was entered in favor of the defendants. When Withrow appealed, the 5th Circuit remanded the case to the district court to "determine whether the parties consented to proceed before the magistrate judge and, if so, whether the consents were oral or written." After the remand, Garibay and Roell filed a letter with the district court stating that they consented to proceeding before the magistrate.

The district court referred the 5th Circuit's inquiry to the same magistrate who presided over the trial. The magistrate reported that the actions of the defendants clearly implied their consent to the jurisdiction of a magistrate. However, the magistrate observed that under 5th Circuit precedent, "consent cannot be implied by the conduct of the parties." Consequently, the magistrate concluded that the failure of Garibay and Roell to give express consent meant that she lacked jurisdiction to hear the case.

The district court adopted the magistrate's report and recommendation over the defendants' objections. The defendants appealed to the 5th Circuit which ruled that "when pursuant to 28 U.S.C. § 636(c)(1), the magistrate judge enters a final judgment, lack of consent and defects in the order of reference are jurisdictional errors that cannot be waived." Furthermore, the 5th Circuit held that a § 636(c)(1) waiver must be express and cannot be implied by a party's conduct. Finally, the defendants' post-judgment consent did not satisfy § 636(c)(1)'s consent

requirement. The defendants appealed and the Supreme Court granted *certiorari*.

Title 28 U.S.C. § 636(c)(1) provides that: “upon the consent of the parties, a full-time United States Magistrate Judge may conduct any and all proceedings in a jury or non-jury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court.” Thus, a § 636(c)(1) referral gives the magistrate judge the full authority over case dispositive motions, conduct of a trial, and entry of final judgment, all without district court review.

The procedure created by § 636(c)(1) and Fed. R. Civ. P. 73(b) envision advance written consent communicated to the clerk of courts. In this case, Roell and Garibay clearly “implied their consent” by voluntarily appearing before the magistrate after being notified: of their right to refuse and that she intended to exercise case dispositive authority. The question with which Supreme Court wrestled was whether implied consent can count as conferring “civil jurisdiction” under § 636(c)(1), or whether strict adherence to the letter of § 636(c)(2) was required.

The Court found that the text and structure of § 636(c)(2) as well as Fed. R. Civ. P. 73(b) suggest that a defect in the referral to a full-time magistrate judge under § 636(c)(2) does not eliminate that magistrate’s “civil jurisdiction” under § 636(c)(1) so long as the parties have voluntarily consented to the referral. The Court held that Roell’s and Garibay’s general appearances before the magistrate, after they had been told of their right to be tried by a district court judge, supplied the consent necessary to establish the magistrate’s “civil jurisdiction” under § 636(c)(1). Therefore, the judgment of the 5th Circuit was reversed.

Demore v. Kim, 123 S.Ct. 1708 (2003).

Title 8 U.S.C. § 1226(c) provides that “the Attorney General shall take into custody any alien who” is removable from this country because he has been convicted of one of a specified set of crimes. Kim is a South Korean citizen who became a lawful permanent resident of the United States in 1986. Ten years later, Kim was convicted of

first-degree burglary in California and in April 1997, Kim was also convicted of “petty theft with priors.”

The INS charged Kim with being deportable from the United States in light of these convictions and detained him pending his removal hearing. Kim disputed neither the validity of his prior convictions nor the INS’s conclusion that he was subject to mandatory detention under § 1226(c). Instead, Kim filed a § 2241 petition wherein he challenged the constitutionality of § 1226(c). Kim argued that his detention under § 1226(c) violated due process because the INS made no individualized determination that he posed either a danger to society or a risk of flight. Instead, the INS simply relied on the mandatory presumption for detention.

The district court ruled that § 1226(c)’s requirement of mandatory detention for certain criminal aliens was unconstitutional. The 9th Circuit affirmed and held that the mandatory detention provision of § 1226(c) violates substantive due process as applied to Kim because he was a permanent resident alien. The government appealed and the Supreme Court granted *certiorari*.

The majority opinion first considered the government’s argument that § 1226(c) deprived federal court’s of jurisdiction to grant habeas relief to aliens challenging their detention under § 1226(c). The Court rejected this argument and found that because Kim challenged the statutory authority that permitted his detention without bail, § 2241 relief was available.

The Court held that § 1226(c) mandates detention during removal proceedings for a limited class of deportable aliens - including those convicted of an aggravated felony. Congress adopted this provision because of the INS’s failure to deal with increasing rates of criminal activity by aliens. Kim did not contest Congress’s general authority to remove criminal aliens from the United States. Moreover, Kim acknowledged that he was deportable within the meaning of § 1226(c).

Kim argued that there was no evidence that mandatory detention was necessary because the government had never shown that individualized bond hearings would be ineffective. Kim maintained that the Due

Process Clause did not permit the government to automatically detain him for the brief period of time (four to six months) necessary for the removal proceedings to be completed.

The Court ruled that in passing § 1226(c), Congress made it clear that permitting the discretionary release of aliens pending removal hearings would lead to large numbers of deportable aliens skipping their hearings and remaining at large in the United States unlawfully. Thus, the Court found that mandatory detention during removal proceedings is a constitutionally permissible part of the deportation process. Consequently, the judgment of the 9th Circuit was reversed.

Virginia v. Black, 123 S.Ct. 1536 (2003).

Virginia's cross-burning statute provides, in pertinent part, that "it shall be unlawful for any person with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another...any person who shall violate this section shall be guilty of a...felony. Any such burning of a cross shall be *prima facie* evidence of an intent to intimidate a person or group of persons."

In 1998, Black led a Ku Klux Klan rally in Virginia. More than 20 people attended the rally which occurred on private property. The rally featured speakers who made many demeaning comments about minorities. Moreover, many of these comments advocated violence against minorities. At the conclusion of the rally, a cross was erected approximately 300 yards from a public road and set afire.

A sheriff observed the cross-burning and approached Black and inquired who was responsible for setting the cross afire. Black responded that he was responsible, stating, "I'm the head of the rally." Black was charged with burning a cross with the intent of intimidating a person or group of persons in violation of Virginia law.

At Black's trial, the jury was instructed that "intent to intimidate means the motivation to intentionally put a person or a group of persons in fear of bodily harm. Such fear must arise from the willful conduct of the accused rather than from some mere temperamental timidity of the victim." The

jury was also instructed that "the burning of a cross by itself is sufficient evidence from which you may infer the required intent."

Black objected to the last instruction on 1st Amendment grounds and the prosecutor responded that the instruction was "taken straight out of the Virginia model instructions." The trial court gave the instruction and the jury convicted Black and his conviction was affirmed on appeal by the Virginia Court of Appeals.

In a separate case, Richard Elliott and Jonathan O'Mara burned a cross on the yard of James Jubilee who was an African-American and Elliott's next door neighbor in Virginia Beach, Virginia. The motive for this cross-burning was to "get back" at Jubilee for complaining about Elliott using his back yard as a firing range where he practiced shooting firearms.

O'Mara plead guilty to violating Virginia law but reserved his right to challenge the constitutionality of the cross-burning statute. At Elliott's trial, the judge instructed the jury that the Commonwealth must prove that the defendant: "intended to commit cross-burning;" "did a direct act toward the commission of the cross-burning;" and "had the intent of intimidating any person or group of persons." The trial court did not instruct the jury on either the meaning of the word "intimidate" or on the *prima facie* evidence provision of the Virginia statute.

A jury convicted Elliott of attempted cross-burning. Both Elliott's and O'Mara's challenges to the cross-burning statute were consolidated on appeal and the Virginia Court of Appeals affirmed their convictions. O'Mara, Elliott, and Black appealed to the Virginia Supreme Court where they argued that the Virginia cross-burning statute was facially unconstitutional. The Virginia Supreme Court consolidated all three cases and ruled that the statute was unconstitutional on its face.

The court held that the statute discriminated on the basis of content because it selectively chose only cross-burning because of its distinctive message. Moreover, the court ruled that the *prima facie* evidence provision rendered the statute overbroad because of the enhanced probability of

prosecution under the statute would chill the expression of protected speech. The United States Supreme Court granted *certiorari*.

The Supreme Court began its opinion with an exhaustive history of cross-burning and of the Ku Klux Klan in the United States. The Court concluded this overview by stating that “while a burning cross does not inevitably convey a message of intimidation, often a cross-burner intends that the recipients of the message fear for their lives. And when a cross-burning is used to intimidate, few if any messages are more powerful.”

The 1st Amendment affords protection to symbolic or expressive conduct as well as to actual speech; however, the protections afforded by the 1st Amendment are not absolute. Instead, the 1st Amendment permits restrictions on the content of speech in areas which are of such “slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”

Thus, the government may punish words “which by their very utterance inflict injury or tend to incite an immediate breach of the peace.” Consequently, the Court has routinely held that “fighting words” are generally proscribable under the 1st Amendment. Moreover, the 1st Amendment permits the government to ban “true threats” which encompass “statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or a group.”

The speaker does not need to intend to carry out the threat; rather, the prohibition on true threats “protects individuals from the fear of violence and from the disruption that fear engenders in addition to protecting people from the possibility that the threatened violence will occur.” The Court concluded this discussion by finding that the history of cross-burning in this country shows that “cross-burning is often intimidating, intended to create a pervasive fear in victims that they are a target of violence.”

Individuals burn crosses as opposed to other means of communication because cross-burning carries a message in an effective and dramatic manner. However, the fact that

cross-burning is symbolic expression, does not resolve the constitutional question. Instead, the Supreme Court ruled that Virginia’s cross-burning statute did not violate the 1st Amendment because it banned cross-burning with the intent to intimidate.

In its opinion, the Supreme Court of Virginia ruled, in the alternative, that Virginia’s cross-burning statute was unconstitutionally overbroad due to its provision stating that “any such burning of a cross shall be *prima facie* evidence of an intent to intimidate a person or group of persons.”

The jury in Elliott’s case did not receive any instruction on the *prima facie* evidence provision and the provision was not an issue in O’Mara’s case because he plead guilty. However, in Black’s case, the jury was instructed that the *prima facie* provision meant that “the burning of a cross, by itself, is sufficient evidence from which you may infer the required intent.”

The United States Supreme Court ruled that the *prima facie* evidence provision, as interpreted by this jury instruction, rendered the statute unconstitutional. The *prima facie* provision stripped away the very reason why the Commonwealth may ban cross-burning with the intent to intimidate. The *prima facie* evidence provision permitted the jury to convict in every cross-burning case in which the defendants exercised their constitutional right not to put on a defense.

Even where the defendant, like Black, presented a defense, the *prima facie* provision made it more likely that the jury would find an intent to intimidate regardless of the particular facts of the case. This provision permitted the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross-burning itself. The Court ruled that the *prima facie* provision chilled constitutionally protected political speech because of the possibility that a state will prosecute, and potentially convict somebody engaging only in lawful political speech which is the core of what the 1st Amendment is designed to protect.

The *prima facie* provision did not distinguish among the different types of cross-burnings. It did not distinguish between a

cross-burning done with the purpose of creating anger or resentment and a cross-burning done with the purpose of threatening or intimidating a victim. Consequently, the Court held that the *prima facie* provision, as interpreted through the jury instruction and applied to Black's case, was unconstitutional on its face. As a result, the United States Supreme Court affirmed the vacation of Black's conviction and it also remanded the convictions entered in the Elliott's and O'Mara's cases for further hearings in the Virginia courts.

SIXTH CIRCUIT DECISIONS

United States v. Layne, 324 F.3d 464 (6th Cir. 2003).

In 2001, law enforcement authorities executed a search warrant on an apartment rented by William Dick in Chattanooga. Upon executing the warrant, the officers discovered Krystal Layne and Bryan Ritchie in the apartment. Ritchie had ephedrine in his pants while Layne had methamphetamine in her mouth. Dick returned shortly after the officers arrived.

The officers concluded that Dick, Layne, and Ritchie were manufacturing methamphetamine using the "ephedrine reduction method." The ephedrine reduction method involves the use of dangerous chemicals and creates toxic gases as by-products which are carcinogenic.

When the warrant was executed, the trio had finished the "cooking" process and were waiting for the liquid methamphetamine to cool so that they could separate the liquid and gas from the mixture. During the search, the officers also recovered other items including toxic chemicals used in the cooking process.

The laboratory had operated in Dick's apartment for at least two weeks and his apartment was located in a densely settled area. The defendants also used methamphetamine while operating the lab which "made the operation more dangerous."

The three defendants were charged with conspiracy to attempt to manufacture methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 846. Dick and Layne plead guilty and a presentence report was prepared. The probation officer recommended the

application of USSG § 2D1.1(b)(6)(A) to Layne's and Dick's offense level. Section 2D1.1(b)(6)(A) applies where the offense involved a methamphetamine laboratory that caused a "substantial risk of harm to human life or the environment." When applicable, this enhancement requires a three level increase to the base offense level. However, if the three level increase does not result in an offense level of 27, § 2D1.1(b)(6)(A) requires the offense level to be elevated to 27.

The district court concluded that the offense committed by Layne and Dick created a "substantial risk of harm to human life" and therefore applied the § 2D1.1(b)(6)(A) enhancement. Because the amount of relevant conduct attributed to Dick and Layne was 19.4 grams of methamphetamine, their base offense level was 18. However, because of the application of § 2D1.1(b)(6)(A), their offense levels were elevated to 27. After the offense levels were reduced for acceptance of responsibility, sentences were imposed and Layne and Dick perfected timely appeals.

The 6th Circuit first considered the propriety of applying § 2D1.1(b)(6)(A). To determine whether § 2D1.1(b)(6)(A) should be applied, courts will consider the: (1) quantity of chemicals or hazardous substances found at the laboratory and the manner in which the chemicals were stored; (2) manner in which toxic substances were disposed and the likelihood of releasing the substances into the environment; (3) duration of the offense and the extent of the manufacturing operation; and (4) location of the laboratory and the number of human lives placed at substantial risk of harm.

Numerous toxic substances were recovered from Dick's apartment. A search turned up a gallon of muriatic acid, numerous jars of clear, two-layered liquids, tubing that suggested that Dick and Layne were attempting to produce hydrogen gas, materials containing red phosphorus residue, empty gallon containers of acetone and Coleman fuel, two ounces of crystal iodine, and white residue believed to be methamphetamine.

All of these substances were flammable and explosive. Some even could cause severe burns and emit dangerous fumes. The quantity of chemicals present could

produce a few ounces of methamphetamine. Moreover, these substances were not stored within the apartment; instead, they were found throughout Dick's apartment.

The 6th Circuit applied the facts of this case to the factors set forth above and concluded that there was insufficient evidence to determine how the chemicals were disposed of and/or released into the environment. However, the court held that the laboratory had been operating for at least two weeks and contained sizable quantities of toxic chemicals, both of which favored the application of § 2D1.1(b)(6)(A).

The last factor considered by the court was the location of the laboratory and the number of human lives placed at risk. The laboratory was throughout Dick's apartment which was part of a large apartment complex in a densely settled area. Moreover, an elementary school was nearby the apartment complex and a creek flowed through the apartment complex and emptied into the Tennessee River. Many of Dick's neighbors complained about the smell of acetone emanating from his apartment.

Consequently, the court held that the laboratory was an inhalation risk not only to the defendants but also to the neighbors. In sum, the court ruled that the first, third and fourth factors supported the application of § 2D1.1(b)(6)(A) and that the district court did not err in applying this enhancement.

Layne also argued that § 2D1.1(b)(6)(A) violated the 8th Amendment's prohibition against cruel and unusual punishment because its application resulted in disproportionate sentences. However, the 8th Amendment does not require strict proportionality between crime and sentence. Instead, the Constitution merely forbids "extreme" sentences that are "grossly disproportionate" to the crime. A sentence within the maximum set by the statute generally does not constitute cruel and unusual punishment. In this case, both sentences were well below the 20 year statutory maximum. Consequently, the court ruled that Layne's 87 month sentence was neither "extreme" nor "grossly disproportionate" to the crime that she

committed and her sentence was affirmed.

Adams v. Holland, —F.3d—, 2003 WL 21146056 (6th Cir. 2003).

In 1991, Adams was convicted of felony murder and two counts of aggravated robbery. In 1992, the Tennessee Court of Criminal Appeals affirmed those convictions and Adams then applied to the Tennessee Supreme Court for permission to appeal. However, Adams did not set forth a Confrontation Clause claim in his application to the Tennessee Supreme Court.

Adam's application was denied in 1998 and he then filed a timely § 2254 petition in the district court. The district court dismissed all of Adams' claims on their merits except for a Confrontation Clause claim that he raised. The district court concluded that Adams had procedurally defaulted the Confrontation Clause claim by failing to bring it before the Tennessee Supreme Court in his petition for permission to appeal.

Two issues were certified for appeal to the 6th Circuit: (1) whether in light of Tennessee Supreme Court Rule 39, Adams' Confrontation Clause claim was procedurally defaulted; and (2) if not, whether the admission of a co-defendant's statements violated Adams' rights under the Confrontation Clause?

Adams conceded that he did not properly preserve the Confrontation Clause issue by raising it in the Tennessee Supreme Court. However, Adams maintained that Tennessee Supreme Court Rule 39 changed the landscape of "exhaustion law" in Tennessee when it was promulgated in 2001. Adams argued that Rule 39 removed review by the Tennessee Supreme Court as an "available state remedy" for any habeas claim and that his Confrontation Clause claim was not procedurally defaulted by his failure to bring it before the Tennessee Supreme Court.

The Warden conceded that Rule 39 no longer required defendants to seek review of claims in the Tennessee Supreme Court in order to exhaust their state remedies. However, the Warden argued that Rule 39 violated the Supremacy Clause of the Constitution. The Warden maintained that because discretionary review was still

technically available in the Tennessee Supreme Court, federal law controlled because Rule 39 could not displace federal law on the question of what provides an available state remedy.

In the alternative, the Warden argued that even if Rule 39 properly removed Tennessee Supreme Court review as an available state remedy, it did not do so “retroactively.” Therefore, the Warden argued that Adams’ claim was still procedurally defaulted. This conclusion was based on the fact that Rule 39 was promulgated after Adams’ habeas petition was submitted and dismissed in the district court.

In *O’Sullivan v. Boerckel*, 526 U.S. 838 (1999), the Court ruled that discretionary appeals to a state supreme court, when they are available as state remedies, must be exhausted before they can be raised in habeas litigation. However, the 6th Circuit recognized that some states have explicitly disavowed state supreme court review as an “available state remedy” and are exempted from the holding announced in *O’Sullivan*.

The 6th Circuit reviewed Rule 39 and concluded that it clearly removed the Tennessee Supreme Court phase of review as a condition precedent for exhaustion. Instead, Rule 39 dictates that once a court of criminal appeals has denied a claim, the litigant shall be deemed to have exhausted all available state remedies available for that claim.

The 6th Circuit also concluded that Rule 39 did not violate the Supremacy Clause. A state law or rule violates the Supremacy Clause only if it explicitly conflicts with federal law. The rule announced in *O’Sullivan* made it clear that the Court did not decide whether a rule, like Rule 39, could remove state supreme court review for habeas purposes. Instead, the Court in *O’Sullivan* stated that what constitutes the body of “available state remedies” is a question of state law, not one of federal law.

Finally, the 6th Circuit considered whether Rule 39 should apply retroactively to habeas petitions that were filed before the rule was promulgated. The court held that, based on the verbiage found in Rule 39, it should apply retroactively to Adams’ case. The

reason for this conclusion was that Rule 39 merely clarified, rather than changed, the habeas exhaustion process in Tennessee. Accordingly, the court found that Adams’ Confrontation Clause claim was not procedurally defaulted and it remanded the case to the district court to consider Adams’ Confrontation Clause claim on its merits.

United States v. Finkley, 324 F.3d 401 (6th Cir. 2003).

Finkley and Halliburton were convicted of participating in a scheme to defraud the United States. The scheme was designed to obtain tax refunds and unemployment checks from government agencies. The conspirators filed more than 75 tax returns that were substantially inflated. By creating shell companies, obtaining employee identification numbers (EIN’s), and creating fake W-2 forms, the conspirators made false claims in excess of \$500,000.

In early 1995, Halliburton joined the scheme that had been designed by a fellow unindicted co-conspirator. Halliburton created a company that was utilized to cash checks that he obtained. Halliburton also prepared false tax returns using the names of friends and associates and he even recruited a nephew to obtain fraudulent refund checks.

Halliburton also recruited Finkley to become a part of the scheme because the conspirators needed access to additional names and social security numbers in order to file more returns. Finkley was a supervisor at a collection agency which gave him access to names, social security numbers, and EIN’s.

Finkley and Halliburton were indicted for conspiracy to defraud the United States, in violation of 18 U.S.C. § 286 and making fraudulent claims against the government in violation of § 287. Both Finkley and Halliburton elected to have a bench trial and were convicted. After sentence was imposed, both defendants perfected timely appeals.

Halliburton argued that the district court improperly enhanced his offense level two levels for his role as an “organizer, leader, manager, or supervisor” within the meaning of USSG § 3B1.1(c). Halliburton maintained that the record did not support the finding that he supervised or managed any part of the

conspiracy and that “merely playing an essential role in the offense was not the equivalent to exercising managerial control over participants.”

In order to be subjected to a role enhancement, the defendant must be an “organizer, leader, manager, or supervisor of one or more other participants.” Halliburton supervised his nephew and this alone justified the enhancement. Halliburton instructed his nephew to cash refund checks that were mailed to him and to claim that they were legitimately obtained. Moreover, Halliburton carried out the scheme and also recruited other individuals including Finkley. Accordingly, the district court’s application of the role enhancement was affirmed.

Finkley and Halliburton next argued that the district court improperly calculated the restitution portion of their judgments. USSG § 5E1.1(a)(1) directs the district court to “enter a restitution order for the full amount of the victim’s loss if this order is authorized under 18 U.S.C. §§ 1593, 2248, 2259, 2264, 2327, 3663, or 3663(A).” However, the applicable statutes make it clear that defendants are obligated to make restitution only to the extent that an “actual loss” was sustained as a result of the offense.

Finkley and Halliburton argued that the district court erred by ordering restitution to reimburse the government based on the “intended loss” rather than the “actual loss” sustained by the government. The government conceded that by ordering the defendants to make restitution in the amount of the “intended loss,” the defendants were impermissibly ordered to pay more than the actual loss that was sustained. Accordingly, the 6th Circuit remanded the restitution portion of Finkley’s and Halliburton’s judgments so that the amount of restitution could be recalculated according to the amount of actual loss suffered.

Bannerman v. Snyder, 325 F.3d 722 (6th Cir. 2003).

Bannerman was sentenced by a district court in Virginia to serve 264 months of imprisonment for violating the federal narcotics laws. Bannerman’s conviction and sentence were affirmed by the 4th Circuit.

Bannerman was denied § 2255 relief and he then filed a § 2241 action in the district court in which he was incarcerated.

Bannerman argued that the International Covenant on Civil and Political Rights (ICCPR) was violated because he was not provided a forum to advance an argument based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Bannerman maintained that the *Apprendi* holding was violated in his case when the district court failed to instruct the jury on both drug quantity and identity.

The 6th Circuit found that a prisoner can challenge the legality of his detention under § 2241 if he can show “that the remedy by motion (§2255) is inadequate or ineffective to test the legality of his detention.” This provision of § 2241 is known as the “savings clause.”

Bannerman alleged that his § 2255 remedy was inadequate or ineffective to test the legality of his detention because the ICCPR had been violated and only § 2241 provided a remedy for treaty violations. The district court ruled that the ICCPR did not entitle Bannerman to bring an action pursuant to § 2241 and dismissed his claim.

The 6th Circuit ruled that the “savings clause” of § 2241 can only be used for a claim of “actual innocence” and a challenge to a sentence based on *Apprendi* cannot provide the basis for an actual innocence claim. Moreover, the court held that a prisoner cannot rely on the ICCPR to circumvent the requirement that challenges the legality of federal detention which must be brought under § 2255 rather than § 2241, absent the claim of actual innocence. The court found that the ICCPR does not provide an independent basis for challenging custody under § 2255 because its provisions are not self-executing, and are not judicially enforceable “laws” of the United States. Accordingly, the 6th Circuit affirmed the dismissal of Bannerman’s § 2241 petition.

Mitchell v. Mason, 325 F.3d 732 (6th Cir. 2003).

The 6th Circuit affirmed the grant of habeas relief to Mitchell in *Mitchell v. Mason*, 257 F.3d 554 (6th Cir. 2001) based on his ineffective assistance of counsel claim. However, the Supreme Court vacated this

decision in light of *Bell v. Cone*, 535 U.S. 685 (2002). On remand, the 6th Circuit applied the regime announced in *Bell* to the case *sub judice*. A summary of the facts is necessary to understand this important decision.

Mitchell was charged with murder under Michigan law. Three days after the killing, Attorney Gerald Evelyn was appointed to represent Mitchell. Evelyn represented Mitchell for months but was suspended from the practice of law one month before Mitchell's trial began; however, Evelyn was reinstated on the day that jury selection began.

Prior to the trial, Mitchell wrote six separate letters to the trial and chief judges requesting new counsel. Mitchell alleged that Evelyn had not visited him at the county jail. Instead, Mitchell's only contacts with Evelyn occurred after three pretrial hearings that were conducted in his case. During these three meetings, Mitchell met with his lawyer a total of six minutes. Eleven days before jury selection began, the trial court conducted a hearing on Mitchell's "Motion for Withdraw of Counsel" at which time Mitchell appeared on his own behalf. Evelyn did not appear at the hearing even though he had notice.

During the hearing, Mitchell informed the court that he had received a letter from Evelyn informing him that he was suspended from the practice of law for a month. Consequently, Mitchell asked for the appointment of new counsel and a postponement of his trial to afford his new lawyer a chance to review his case. The trial court took Mitchell's motion under advisement.

On the second day of jury selection, Mitchell again renewed his motion for new counsel. Evelyn informed the trial court that Mitchell wanted him removed because Evelyn had failed to visit Mitchell the night before as he had promised. At this time, the trial court denied Mitchell's motion for a continuance as well as his motion for the appointment of new counsel.

On the sixth day of trial, Evelyn informed the trial court that he had received a grievance letter filed by Mitchell with the Michigan Attorney Grievance Commission. At this time, Evelyn offered to withdraw from

the case. However, in response to questions posed by the trial court, Mitchell stated that he was satisfied with Evelyn's representation.

At Mitchell's trial, Evelyn did not present an opening statement, Mitchell did not testify and Evelyn did not present any witnesses on Mitchell's behalf. At the close of the prosecution's case, Evelyn moved for a directed verdict and the trial court partially granted the motion by reducing the charge to second-degree murder. During closing arguments, Evelyn argued that the eye-witness's testimony was equivocal and that the prosecution had not carried its burden of proof. Nonetheless, the jury convicted Mitchell of second-degree murder.

The Michigan Supreme Court affirmed Mitchell's conviction after finding that he received the effective assistance of counsel. The Michigan Supreme Court ruled that the pretrial stage of a criminal case was not a critical stage and thus refused to apply the *per se* prejudice rule. Instead, the court evaluated Mitchell's 6th Amendment claims using the two prong analysis announced in *Strickland v. Washington*, 466 U.S. 668 (1984).

The first question that the 6th Circuit addressed was whether Mitchell sought to apply a rule of law that was clearly established at the time that his state court conviction became final. Mitchell sought to apply the "*per se*" ineffective assistance of counsel rule that was announced in *United States v. Cronin*, 466 U.S. 648 (1984). In *Cronin*, the Court held that an appeals court must reverse a defendant's conviction, without any specific showing of prejudice to the defendant, when counsel was either totally absent or prevented from assisting the accused during a critical stage of the proceeding.

The 6th Circuit held that it was clearly established by the Supreme Court, as of the time that Mitchell's case was decided in state court, that the complete denial of counsel during a critical stage of the judicial proceedings mandated a presumption of prejudice.

The 6th Circuit next considered whether the Michigan Supreme Court's decision rejecting Mitchell's ineffective assistance claim was contrary to or an

unreasonable application of that established law or was based on an “unreasonable determination of the facts in light of the evidence presented in the state court proceedings.”

In *Bell*, the Supreme Court explicitly defined the differences between claims governed by *Strickland*, and those governed by *Cronic*. For claims governed by *Strickland*, a defendant must demonstrate that specific errors made by trial counsel affected the defendant’s ability to receive a fair trial.

In contrast, if a claim is governed by *Cronic*, the defendant is not obligated to demonstrate prejudice resulting from a lack of effective counsel. There are three types of cases that warrant *Cronic*’s presumption of prejudice analysis: (1) the complete denial of counsel in which the accused is denied the presence of counsel at a critical stage; (2) when counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing; and (3) when counsel is placed in circumstances in which competent counsel very likely could not render assistance.

The 6th Circuit found that the pretrial period was a critical stage and the denial of counsel during this period supported the application of the *Cronic per se* prejudice analysis. What constitutes a critical stage should not be limited to formal appearances before a judge. Instead, the court stated that the pretrial period was “critical” because it encompassed counsel’s constitutionally imposed duty to investigate the case. Without pretrial consultation with the defendant, trial counsel cannot fulfill his duty to investigate. The court ruled that the 6th Amendment guaranteed more than a *pro forma* encounter between the accused and his counsel. Moreover, six minutes of consultations spread over three meetings did not satisfy the requirements of the 6th Amendment.

The fact that Mitchell’s counsel was suspended from the practice of law for 30 days prior to the trial did not alone drive the 6th Circuit’s decision. However, this fact contributed heavily to the court’s conclusion that there was no consultation between Mitchell and his attorney prior to trial.

The 6th Circuit found that the Michigan

Supreme Court’s conclusion that the pretrial period was not a “critical stage” of the proceedings was contrary to and an unreasonable application of Supreme Court precedent. Moreover, based on Evelyn’s suspension and his failure to visit Mitchell, there was a complete deprivation of counsel. The court then applied the *per se* prejudice rule and affirmed the grant of habeas relief.

United States v. Moran, 325 F.3d 790 (6th Cir. 2003).

Moran plead guilty to a federal narcotics charge and was sentenced to prison. After the sentencing, the government filed a motion pursuant to Fed. R. Crim. P. 35(b) to reduce Moran’s sentence by 38 months for his substantial assistance. The district court was not overly impressed with Moran’s cooperation and only reduced his sentence by 18 months. Moran appealed and argued that the district court abused its discretion by not granting the full reduction sought by the government.

The only issue addressed in this appeal was whether the 6th Circuit had jurisdiction to adjudicate this case. Title 18 U.S.C. § 3742(a) defines the circumstances under which a defendant may appeal an “otherwise final sentence.” Under § 3742(a), a defendant may appeal a sentence if it: (1) was imposed in violation of law; (2) was imposed as a result of an incorrect application of the sentencing guidelines; (3) is greater than the sentence specified in the applicable guideline range; or (4) was imposed for an offense for which there is no guideline and is plainly unreasonable.

The 6th Circuit ruled that the district court’s reduction of Moran’s sentence under Rule 35(b) was a “sentence” within the meaning of § 3742(a). However, because Moran’s “abuse of discretion claim” did not fall within the four classes of cases set forth in § 3742(a), the court did not have jurisdiction to hear his appeal. Consequently, Moran’s appeal was dismissed.

McKenzie v. Smith, 326 F.3d 721 (6th Cir. 2003).

On March 7, 1984, a construction worker reporting for work in Detroit, encountered a woman who he had never seen

before. The woman, who was never identified, told the worker to enter a nearby vacant building. The construction worker entered the building and found Quattura Sutton unconscious and lying on the floor of the unheated building.

The temperature that morning was seven degrees but Quattura was dressed only in a tee shirt and overalls. A pool of blood from her head had frozen, sticking her face to the floor. The worker picked up Quattura and took her out of the building. The worker then found a police officer who took Quattura to the hospital.

Quattura was in critical condition and suffering from severe hypothermia. Moreover, Quattura had severe bruises to her head that were suggestive of abuse. A doctor testified that the child was emotionally traumatized and was in an "acutely deranged abnormal condition."

Quattura lived with her mother, Elena Carter, and McKenzie, who was Carter's boyfriend, at the home of Carter's aunt, Patricia. Patricia also had two children, Tonya and Wilbert, who resided in her home that was located around the corner from the vacant building in which Quattura was found. At the time of this incident, McKenzie and Carter had been dating for three years and had lived together since Quattura was one year old. Even though McKenzie was not Quattura's biological father, she referred to him as "daddy."

The night before Quattura was found, Carter and McKenzie spent the evening at home using drugs with a friend, Darrell Reed. After Reed left the home, Carter told McKenzie that she was going to leave the home and borrow money to buy more drugs. McKenzie told Carter that he was going to lie on the living room couch with Quattura when Carter was gone. McKenzie stated that he would lock the door and that Carter should ring the door bell when she returned.

Carter testified that she had no intention of going out to borrow money that night. Instead, Carter wanted to join another man to use drugs. Carter testified that she spent the remainder of the night with this other man and she called her mother the next

morning at which time she was told that Quattura was in the hospital.

After she awoke on March 7, 1984, Patricia Carter saw McKenzie sitting on the bed in the back bedroom "making a crying noise." Patricia testified that McKenzie asked her if she had seen Quattura because the child was not in the house. Patricia went downstairs looking for Quattura but could not find her. Patricia noted that the door was unlocked and several hours later, Patricia received word that Quattura was hospitalized.

Patricia's nine year old son, Wilbert, testified that he woke up that morning and heard McKenzie come into the house through the front door. Wilbert stated that he saw McKenzie go up to his mother's bedroom and then into McKenzie's own bedroom where he made crying noises. Quattura's maternal grandmother, Juanita Horton, testified that she saw Quattura at the hospital after she was admitted. During the hospital visit, Juanita stated that Quattura told her "see grandma, what daddy did to me." The trial judge ruled that this statement was an "excited utterance" and was therefore admissible as an exception to the hearsay rule.

The prosecutor and McKenzie's defense attorney agreed that Quattura was not competent to testify at McKenzie's trial and she was not called as a witness. The parties also stipulated that Quattura's hospital records contained a notation by a nurse who was present in the room at the time that this "excited utterance" was made. The nurse indicated that she thought she heard Quattura say "Donna" rather than "Daddy."

Quattura later told a nurse that "Will did it" (meaning that Patricia's son Wilbert committed the assault). McKenzie's lawyer argued that the jury should be allowed to hear testimony concerning the "Will statement" because it was inconsistent with the "daddy statement" introduced in Juanita's testimony. However, the trial court refused to admit the "Will" statement.

The state produced no physical evidence linking McKenzie to Quattura's assault. Quattura's mother and grandparents testified that McKenzie had never hit Quattura in the past. McKenzie did not testify or

present any evidence at all. However, statements made by McKenzie to police when he was questioned were admitted. In these statements, McKenzie denied harming Quattura and he stated that he was not aware of Quattura's absence from the home until he went downstairs at 6:30 A.M.

After hearing the testimony, the jury deliberated for more than four hours and notified the judge that they were deadlocked. The trial court refused to grant a mistrial and instead delivered an "Allen charge." The jury continued to deliberate and shortly thereafter convicted McKenzie of attempted murder.

Over the next ten years, McKenzie engaged in numerous appeals as well as post-conviction attacks of his conviction, all of which were unsuccessful. In June 1998, McKenzie petitioned the 6th Circuit for permission to file a successive habeas petition to litigate a sufficiency of the evidence claim. The 6th Circuit ruled that McKenzie had met the gateway standard to permit review of his claim to prevent a "fundamental miscarriage of justice." Accordingly, the court afforded McKenzie the opportunity to litigate his sufficiency of the evidence claim.

In the district court, an evidentiary hearing was conducted at which McKenzie's trial counsel testified. After the hearing, the district court ruled that the evidence supported McKenzie's conviction. In making this determination, the court relied on Quattura's statement to Juanita that "daddy" assaulted her as well as other circumstantial evidence showing that McKenzie had the opportunity to commit the assault. Consequently, the district court held that a juror could have reasonably concluded that McKenzie was guilty of assault with the intent to murder. McKenzie appealed this ruling to the 6th Circuit.

The 6th Circuit first wrestled with the standard of review that was to be applied to this case—either deferential under the AEDPA or *de novo*. The court subjected the state courts' handling of this case to *de novo* review because the state courts had only addressed the admissibility of evidence claim and had never addressed whether there was sufficient evidence to support McKenzie's conviction. Accordingly, as there was no reasoning to

which the 6th Circuit could defer, an attempt to determine whether the state courts' decisions were "contrary to or involved an unreasonable application of clearly established federal law" would be futile.

In reviewing the sufficiency of the evidence claim, the 6th Circuit was asked to determine whether, after viewing the evidence in the light most favorable to the government, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Circumstantial evidence alone, if substantial and competent, may support a verdict and need not remove every reasonable hypothesis except that of guilt. However, if the judgment is not supported by substantial and competent evidence upon the record as a whole, the judgment must be vacated.

To establish that McKenzie was the perpetrator of the assault, the state relied heavily on Quattura's hearsay statement that "daddy did it" along with evidence that McKenzie had the opportunity to commit the crime. However, the 6th Circuit was troubled by the admission of Quattura's hearsay statement. Because of Quattura's out-of-court statement and the fact that she was incompetent to testify, cross-examination of her was impossible. Moreover, given the age and mental state of Quattura and the conflicting versions of what she said, the court concluded that the state's reliance on the "daddy statement" to support McKenzie's conviction was unwarranted.

While such evidence could be used to bolster the prosecution's case, a statement made by an "incompetent" declarant simply does not constitute proof beyond a reasonable doubt. There was circumstantial evidence that suggested that McKenzie was in the home and upset the morning that Quattura was discovered to be missing. However, there were other people in the home on the morning that Quattura was assaulted. Additionally, there was no physical evidence linking McKenzie to Quattura's assault.

Family members all agreed that they have never seen McKenzie harm Quattura and they could not imagine that he would. Consequently, the court ruled that given the

circumstances of Quattura's out-of-court statement and the lack of any corroborating evidence, McKenzie's conviction was not supported by sufficient evidence. Accordingly, the case was remanded with instructions for the district court to issue the writ of habeas corpus.

Scotty's Contracting and Stone, Inc., v. United States, 326 F.3d 785 (6th Cir. 2003).

In 1998, the IRS initiated a criminal investigation into the federal tax liabilities of James Scott who owns Scotty's Contracting and Stone Company, Inc. (hereinafter Scotty's). On June 12, 2001, the IRS-CID issued a summons to Richard Callahan and Kent Kirby who were accountants for both Scott and Scotty's during the relevant tax years. The express purpose for the summons was to further the IRS's criminal investigation into whether Scott had violated the Internal Revenue Code. Among other things, the summons requested testimony regarding Scotty's tax records.

In response, Scotty's filed an action seeking to quash the summons. Scotty's contended that the IRS issued the summons in bad faith because it was issued for the sole purpose of furthering a criminal investigation. Moreover, Scotty's argued that the enforcement of the summons would violate Kentucky's accountant-client privilege. The government moved for summary enforcement of the summons.

The district court denied Scotty's petition to quash and granted the government's motion for summary enforcement. The district court concluded that the IRS may properly issue a summons for the sole purpose of furthering a criminal investigation. Moreover, the district court ruled that Kentucky's accountant-client privilege did not prevent the enforcement of a validly issued summons.

Scotty's appealed the district court's ruling to the 6th Circuit. The first question considered by the court was raised by the government and addressed whether Scotty's had standing to challenge the summons because the target of the criminal investigation was Scott, and not Scotty's. The 6th Circuit concluded that under 26 U.S.C. §

7609(b)(2)(A) any entity that is entitled to notice of a summons has the right to bring a proceeding to quash the summons. Because Scotty's records were being sought under the summons, Scotty's was entitled to notice and thereby had standing to move to quash the summons.

The next question was whether the IRS may validly issue a summons solely to further a criminal investigation? In *United States v. LaSalle National Bank*, 437 U.S. 298 (1978), the Supreme Court ruled that the IRS may not validly issue a summons pursuant to § 7602 for the sole purpose of furthering a criminal investigation, even if the investigation had not yet been referred to the Department of Justice for prosecution. However, the Court's ruling was based on its interpretation of § 7602 as it existed in 1978.

In 1982, Congress amended § 7602 in two significant ways: (1) Congress added a fifth purpose for which the IRS could issue a summons—"the IRS may issue a summons for the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws;" and (2) Congress explicitly dictated when the IRS's summoning authority ends; when the IRS refers a criminal investigation to the Department of Justice.

Because § 7602 now grants the IRS the authority to issue summonses for the purpose of investigating "any offense" relating to the tax code, the 6th Circuit held that the IRS may validly issue summonses for the purpose of investigating a criminal offense, even if that is the sole purpose for the summons.

As an alternate argument, Scotty's claimed that Kentucky's accountant-client privilege protected the information sought by the IRS in the summons. However, the 6th Circuit rejected this argument because in *United States v. Arthur Young & Co.*, 465 U.S. 805 (1984), the Court ruled that the IRS's summoning authority under § 7602 was not limited by state law accountant-client privilege. Additionally, the 6th Circuit interpreted Kentucky's accountant-client privilege statute and held that there was an exception for a "validly issued summons enforceable by order of a court." Accordingly,

the judgment of the district court was affirmed.

United States v. Graham, 327 F.3d 460 (6th Cir. 2003).

Graham was convicted of the following crimes: conspiracy to commit offenses against the United States, in violation of 18 U.S.C. § 371 (count 1); being an unlawful user of marijuana in possession of firearms, in violation of 18 U.S.C. § 922(g)(3) (count 9); attempting to manufacture marijuana, in violation of 21 U.S.C. § 841(a)(1) (count 10); conspiracy to manufacture marijuana, in violation of 21 U.S.C. § 846 (count 11); carrying a semi-automatic assault weapon during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c) (count 13); and carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c) (count 14).

Graham's base offense level yielded a sentencing range of 360 months to life. The district court then applied USSG § 5G1.2 which governs sentences involving convictions for multiple counts. Section 5G1.2(a) provides in relevant part that if the statute that governs sentences for a particular crime of conviction requires the imposition of a consecutive sentence, then the court shall impose that sentence. This provision was triggered by Graham's § 924(c) convictions which mandated consecutive sentences of 20 years on count 13 and five years on count 14.

USSG § 5G1.2(d) requires that when the sentence for the count with the highest statutory maximum is less than the total punishment, the sentences shall run consecutively, but only to the extent necessary to produce a combined sentence that equals the total punishment. Once the combined sentences reach the total punishment, the sentences are to run concurrently.

USSG § 5G1.2(d) affected Graham's sentences imposed on counts 1, 9, 10, and 11. The district court determined that counts 10 and 11 each had a statutory sentencing range of 5 to 40 years. After finding that Graham was responsible for more than 100 marijuana plants, the district court sentenced Graham to serve 30 year concurrent sentences on each of those counts. The district court also sentenced

Graham to five years on count 1 as well as 10 years on count 9.

The district court then applied § 5G1.2(d) and held that the sentence on the charge involving the greatest statutory maximum, the 30 year sentence imposed on counts 10 and 11, equaled the total punishment of 360 months. Consequently, the district court imposed concurrent sentences on counts 10 and 11 and ordered those sentences to run concurrently with the sentences imposed on counts 1 and 9. However, the district court added the mandatory 20 and five year sentences on counts 13 and 14 and ordered those to run consecutively to each other as well as to the 360 month sentence imposed on Counts 1, 9, 10, and 11. Thus, the total sentencing package was 55 years in prison and Graham appealed.

In a prior opinion found at 275 F.3d 490 (6th Cir. 2001), the 6th Circuit found that the district court's sentence violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000) because the indictment did not contain an allegation that Graham was responsible for 100 marijuana plants and the jury did not make this finding beyond a reasonable doubt. Consequently, the 6th Circuit ruled that it was error for the district court to apply a statutory sentencing range of 5-40 years for counts 10 and 11. Instead, the statutory sentencing range for these two offenses would be maximum terms of five years in prison. However, the 6th Circuit's opinion left Graham's guideline range on counts 1, 9, 10, and 11 at 360 months-life.

As a result of the 6th Circuit's 2001 opinion, the statutory maximums available to the district court on remand were: count 1 - 5 years; count 9 - 10 years; count 10 - 5 years; count 11 - 5 years; count 13 - 20 years; and count 14 - 5 years. Because Graham's guideline sentence on counts 1, 9, 10, and 11 was still 360 months-life, the district court applied § 5G1.2(d) and stacked the statutory sentences and imposed a 50 year sentence.

Graham again appealed to the 6th Circuit and argued that a 35 year sentence should have been imposed. Graham maintained that after imposing the 25 year sentences on the gun charges, § 5G1.2(d) required the district court to impose all

remaining sentences to run concurrently with each other and this sentence would run consecutively with the two sentences imposed for the firearms convictions. Under this theory, the sentences for counts 1, 9, 10, and 11 would be subsumed within the 10 year sentence on count 10 which, when added to the sentences imposed on the gun charges, would yield a sentence of 35 years.

However, in this case, the “total punishment” under the guidelines was 360 months to life. Because § 5G1.2(d) excludes offenses that carry mandatory sentences that the statute requires to run consecutively to any other sentences when determining the combined offense level, the “total punishment” should be calculated based on the offenses in counts 1, 9, 10, and 11, without reference to the firearms convictions.

A defendant’s sentence must run consecutively under § 5G1.2(d) so that they reach the total punishment independently of any mandatory consecutive sentences identified by the statute. In cases in which the sentence on the count with the highest statutory maximum is less than the total punishment, courts must stack the sentences that do not carry mandatory consecutive sentences “to the extent necessary to produce a combined sentence equal to the total punishment” and then impose, in addition, any mandatory consecutive sentences to run consecutively.

If the sentence on a count carrying a mandatory consecutive sentence was aggregated with other sentences for purposes of determining the “total punishment” under § 5G1.2(d), Congress’s specific statutory requirement that the sentence must be imposed independent of any other sentence and run consecutive to any other sentence would have little meaning. When § 5G1.2(a) states that sentences to such crimes are “to run consecutively to any other term of imprisonment” it means precisely that.

In this case, the district court could not have imposed any other sentence. With a total guideline punishment of 360-life, § 5G1.2(d) required the court to impose sentences on counts 1, 9, 10, and 11 to run consecutively to the extent necessary to produce a sentence equal to the total punishment. The

aggregation of those four sentences added up to 25 years which was still shy of the total punishment of 360 months. Moreover, the sentences on the firearms counts could not count toward the “total punishment” because § 5G1.2(a) requires that these sentences must be imposed independently of and consecutively to any other sentence. Accordingly, the 6th Circuit affirmed the 50 year sentence imposed.

United States v. Perez-Olalde, 328 F.3d 222 (6th Cir. 2003).

Perez-Olalde was indicted for illegal re-entry after deportation in violation of 8 U.S.C. § 1326(a). The government filed a “notice of sentence enhancement” stating that due to a prior heroin conviction, Perez-Olalde would be subject to an enhanced sentence under 8 U.S.C. § 1326(b).

Perez-Olalde plead guilty and his offense level was enhanced for an assault but not for the heroin conviction. The assault conviction was used for the enhancement because of the version of the Guidelines Manual that was applicable to this case. After Perez-Olalde was sentenced, he perfected an appeal to the 6th Circuit.

Perez-Olalde’s first argument was that he could not be sentenced under § 1326(b)(2) because the indictment alleged a violation of § 1326(a); however, the 6th Circuit found that § 1326(b) merely lists sentencing factors, rather than a separate crime. Therefore a defendant could be sentenced under the provisions of § 1326(b) if he had the requisite prior record of aggravated felonies.

Perez-Olalde also argued that his right to due process was violated when the district court enhanced his sentence based on a prior conviction that was not set forth in the “notice of sentence enhancement.” The 6th Circuit found that § 1326 does not require the government to file a notice stating that, due to a prior conviction, the defendant will be subjected to an enhanced guideline sentence. Instead, the enhancement under § 1326 occurs by simple application of the statute. Finally, the 6th Circuit held that Perez-Olalde had ample notice that the district court would consider the assault conviction as a possible basis for a sentencing enhancement. Accordingly, the sentence imposed was

affirmed.

McClendon v. Sherman, —F.3d—, 2003 WL 21012534 (6th Cir. 2003).

In 1991 McClendon was convicted of two drug offenses in violation of Michigan law and sentenced to life in prison. McClendon's direct appeal was denied by the Michigan Supreme Court on August 28, 1995. On April 23, 1997, McClendon filed a motion for relief from judgment in the state trial court wherein, among other things, he argued that he was denied the effective assistance of counsel on direct appeal. The trial court denied McClendon relief and the Michigan Supreme Court denied McClendon's application for leave to appeal on November 29, 1999.

On November 28, 2000, McClendon filed a § 2254 petition. The district court granted the Warden's motion for summary judgment after ruling that McClendon's petition was not filed within the one-year statute of limitations period provided in 28 U.S.C. § 2244(d)(1).

The district court reasoned that the statute of limitations began running on April 24, 1996 (the day on which the AEDPA was enacted) and that when McClendon filed his motion for relief from judgment on April 23, 1997, the limitation period was tolled with one day remaining on the statute of limitations clock. The statute of limitations clock began running when the Michigan Supreme Court denied McClendon leave to appeal on November 29, 1999. Consequently, the statute of limitations expired on December 1, 1999.

The district court also rejected McClendon's argument that he was entitled to equitable tolling as his proffered explanations for his tardy petition were conclusory and he offered no explanation for his ignorance of the one-year statute of limitations period that was enacted as part of the AEDPA. McClendon then perfected a timely appeal to the 6th Circuit.

According to § 2244(d)(1), state prisoners have a one-year period in which they may file a § 2254 petition. This statute of limitations begins running from the latest of four possible events that are set forth in the statute. The relevant event in this case is "the

date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review."

Because the statute of limitations is not jurisdictional, state prisoners who fail to file timely petitions may still file habeas petitions if they can show they are entitled to an equitable tolling of the statute of limitations. Thus, the first question the 6th Circuit pondered was whether McClendon filed his § 2254 petition within the statute of limitations period. Prisoners whose convictions became "final" prior to the enactment of the AEDPA are given a one year grace period in which they must file their petitions. The grace period began running on April 24, 1996.

The next question that the court considered was exactly when McClendon's conviction became final. A conviction becomes final, for § 2244(d) purposes, when direct review concludes and not when the habeas petitioner has exhausted all state post-conviction remedies. Section 2244 explicitly distinguishes between the conclusion of direct review, after which the limitation period begins to run, and post-conviction remedies, during which the limitation period is merely tolled. Thus, the plain language of § 2244(d) indicates that an application for state post-conviction or other collateral relief does not serve to delay the date from which a judgment becomes final. Instead, these filings merely toll the running of the statute of limitations.

McClendon's direct review ended on August 28, 1995 when the Michigan Supreme Court refused to reconsider its decision denying McClendon leave to appeal his conviction. Because McClendon's conviction became final before the enactment of the AEDPA, his statute of limitations period began running on April 24, 1996.

The 6th Circuit also concluded the statute ran 364 days before McClendon filed his motion for relief from judgment on April 23, 1997. Moreover, the statute was tolled while McClendon's motion was pending but it began running again the day after he was denied state post-conviction relief on November 29, 1999. Because McClendon did not file his federal habeas petition until

November 28, 2000, it did not comply with the statute of limitations period unless he could establish that the period was equitably tolled between December 1, 1999 and November 28, 2000.

A habeas petitioner bears the burden of demonstrating that he is entitled to equitable tolling. In analyzing whether a petitioner is entitled to equitable tolling, the 6th Circuit considers the following factors: (1) lack of actual notice of the filing requirement; (2) lack of constructive knowledge of the filing requirement; (3) diligence in pursuing one's rights; (4) absence of prejudice to the defendant; and (5) a plaintiff's reasonableness in remaining ignorant of the notice requirement.

McClendon maintained that the combination of his lack of notice of the April 24, 1997 deadline, his diligent filing of his habeas petition after his state proceedings were completed, and the lack of prejudice to the Warden warranted the equitable tolling of the statute of limitations. However, the 6th Circuit held that McClendon's proposed justifications for missing the statute of limitations period did not justify the application of the equitable tolling doctrine. Consequently, the judgment of the district court was affirmed.

Powell v. Collins, 328 F.3d 268 (6th Cir. 2003).

In 1986, Powell was indicted by the Hamilton County grand jury with capital offenses in connection with the death of a seven year old, Trina Dukes. Powell threw Dukes out of a window after she resisted his sexual advances.

On September 17, 1986, Powell's appointed counsel filed a motion for the appointment of either a psychiatrist or a psychologist to assist in Powell's defense. However, the presiding judge denied the motion. On December 18, 1986, counsel asked the trial court to reconsider its decision denying this assistance. Powell's counsel informed the court that they had recently received Powell's juvenile court records and psychological evaluations and that those documents revealed mental deficiencies. Counsel further claimed that these deficiencies warranted the appointment of an

expert to assist the defense in the presentation of its case; however, the motion was again denied.

On December 23, 1986, the trial judge ordered Powell to undergo psychological testing at the court's psychiatric center. A clinical psychologist, Dr. Schmidtgoessling, was appointed as a "friend of the court" and performed a psychological evaluation of Powell. Defense counsel renewed their requests for the appointment of an expert to assist them in reviewing Dr. Schmidtgoessling's report "so that counsel could understand exactly what it means." However, the trial court again denied their motion.

Defense counsel then filed a suggestion of incompetency. Approximately one week before the trial, Dr. Schmidtgoessling testified at a hearing concerning the result of her competency evaluation of Powell. Dr. Schmidtgoessling testified that she examined Powell for 2 ½ hours and found him alert, able to communicate, and able to comprehend not only the charges against him but also the dire consequences of a guilty verdict.

Dr. Schmidtgoessling noted that due to a psychological deficit, Powell suffered from "anti-social personality." However, this defect did not meet the legal definition of insanity because the defect was not "of sufficient severity to cause Powell to be incapable of knowing right from wrong or to restrain himself from doing a certain act."

After Dr. Schmidtgoessling testified, counsel once again requested psychological assistance, claiming ignorance as to certain psychological terms and the inability to comprehend Dr. Schmidtgoessling's report or to question her about it. The trial court again denied counsel's motion and it found Powell competent to stand trial.

During the guilt phase of the trial, defense counsel called Dr. Schmidtgoessling as a defense witness at which time she repeated much of the information that she provided at the competency hearing. After the jury convicted Powell of numerous crimes, including a capital offense, counsel moved to hire a neuropsychiatrist to assist Powell at the mitigation phase of his trial. The trial court granted this motion but it once again engaged

Dr. Schmidtgoessling from the court's psychiatric clinic as the expert.

The trial court also refused to grant a continuance of the sentencing hearing to allow for additional testing of Powell even though Dr. Schmidtgoessling admitted that she was not equipped to conduct the necessary testing for this phase of Powell's case. Defense counsel called Dr. Schmidtgoessling as its only witness during the sentencing phase. Dr. Schmidtgoessling explained that she was not given sufficient time to conduct an appropriate investigation into Powell's mental make up, to interview necessary family members and acquaintances, or to run needed diagnostic tests.

Moreover, Dr. Schmidtgoessling stated that she had not evaluated Powell since the initial competency evaluation that she conducted two weeks before the trial began. After the mitigation hearing was concluded, the jury deliberated and recommended the imposition of the death penalty and the trial court accepted this recommendation.

Powell was unsuccessful on direct appeal as well as the state post-conviction process. On December 21, 1994, Powell filed a § 2254 petition and many of the assignments of error addressed the trial court's refusal to provide him with an expert psychiatrist or psychologist to assist in the preparation and/or presentation of a defense at either the guilt or mitigation phases of his trial. The district court denied Powell habeas relief and he perfected a timely appeal to the 6th Circuit.

Because Powell's habeas petition was filed before the enactment of the AEDPA, the court applied the pre-AEDPA standard of review. Under this standard, the 6th Circuit reviewed the district court's legal conclusions in refusing to grant the writ *de novo*; but the district court's factual findings were reviewed for clear error.

Under this regime, a writ of habeas corpus can only issue if the state court proceedings were fundamentally unfair as a result of a violation of the Constitution or laws or treaties of the United States. The state court's factual findings are entitled to a presumption of correctness, which is rebuttable by clear and convincing evidence.

Although the review of the denial of

the habeas petition is governed by pre-AEDPA standards, the scope of the 6th Circuit's review is governed by post-AEDPA requirements because Powell's notice of appeal was filed after the effective date of the AEDPA.

In his first and second grounds for habeas relief before the district court, Powell argued that the trial court's denial of his motions for expert assistance deprived the jury of relevant information concerning his mental history and possible organic brain damage in violation of his due process rights. The district court concluded that a due process violation did not occur because the state "adhered to the mandate of *Ake v. Oklahoma*, 470 U.S. 68 (1985), by appointing a neutral psychological expert."

In *Ake*, the Supreme Court held that the Due Process Clause obligates States to provide an indigent defendant with access to a psychiatric examination and assistance when the defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial. *Ake* also held that when appropriate, the right to expert assistance extends to the sentencing phase of capital proceedings.

The 6th Circuit concluded that an indigent defendant's constitutional right to psychiatric assistance in preparing an insanity defense is not satisfied by the appointment of a "neutral" psychiatrist - *i.e.*, one whose report is available to both the defense and the prosecution. Consequently, as long as Powell made the requisite preliminary showing that his sanity at the time of the offense was to be a "significant factor at trial" the trial court erred in failing to grant his motion for an independent psychiatrist.

The Supreme Court ruled in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), that an indigent defendant seeking psychiatric assistance must base his preliminary showing on more than a general statement of need. Instead, the defendant must support his request for the appointment of an expert with specific facts. The 6th Circuit concluded that Powell provided the trial court with necessary particularized facts sufficient to trigger *Ake*'s requirement of psychiatric assistance. Accordingly, the 6th Circuit found that the trial

court erred in denying Powell's motion for independent psychiatric assistance.

Nonetheless, the court also concluded that this error was harmless because the trial court's failure to provide Powell with an independent court-appointed psychiatrist did not have an "injurious effect on the jury's verdict." However, the 6th Circuit concluded that the denial of an *Ake* expert at the mitigation phase was not harmless error. Dr. Schmidtgoessling, by her own admission, was ill-equipped to conduct the appropriate examination required for her to set forth all of the facts that the jury should have considered in mitigation. Unlike the guilt phase of Powell's trial, the testimony of an independent psychiatrist may have provided facts and information for the jury to consider in mitigation, which may have lead to a different recommendation by the jury at sentencing. Consequently, the court concluded that Powell's lack of expert assistance "had a substantial and injurious effect or influence in determining the jury's decision at sentencing." Accordingly, the court vacated Powell's death sentence and ordered a new mitigation hearing to be conducted.

After the guilt phase of the trial was concluded, Powell's counsel sought a continuance for the purpose of obtaining an additional psychiatric examination for presentation at the mitigation hearing; however, the trial court denied this request.

The decision whether to grant a motion for continuance is within the discretion of the trial court. Consequently, to be cognizable in a habeas forum, a habeas petitioner must show that the denial of his motion was so egregious as to deprive him of a fundamentally fair adjudication, thus violating the Due Process Clause. Moreover, a habeas petitioner must also show that the denial of his request for a continuance resulted in actual prejudice to his defense.

Among the factors to be considered by a court in determining whether a continuance was properly denied are: (1) the length of the requested delay; (2) whether other continuances had been requested and granted; (3) the convenience or inconvenience to the parties, witnesses, counsel, and the court; (4) whether the delay was for legitimate reasons

or whether it was dilatory, purposeful, or contrived; (5) whether the defendant contributed to the circumstances giving rise to the request; (6) whether denying the continuance will result in identifiable prejudice to the defendant's case; and (7) the complexity of the case.

The 6th Circuit weighed these factors and concluded that the district court erred in upholding the trial court's denial of Powell's request for a continuance. Dr. Schmidtgoessling's testimony did not fully answer the questions that Powell sought to answer if he had been given additional time. Powell's request was neither dilatory nor contrived and by all appearances the request would not have inconvenienced Dr. Schmidtgoessling or any other witness. Even though the continuance would have disrupted the jurors' lives, any inconvenience to the jury paled when compared to the gravity and magnitude of the issue involved -- whether the death penalty should be imposed. Accordingly, the 6th Circuit granted the writ on this issue as well.

Finally, the court considered whether Powell was deprived of the effective assistance of counsel at the penalty phase of his trial. Even though trial counsel had several months to prepare for the mitigation hearing, they spent less than two days preparing because they waited until Powell was found guilty and only then prepared for the penalty phase.

Counsels' mitigation testimony consisted of only one witness - Dr. Schmidtgoessling. By calling Dr. Schmidtgoessling to testify, counsel also permitted the jury to again hear testimony regarding Powell's capacity to form the intent and purpose to commit aggravated murder. Counsel failed to investigate, research, or collect pertinent records regarding Powell's background or history for mitigation purposes and made no attempt to locate significant persons from Powell's past who may have provided viable testimony regarding mitigating factors. Therefore, the 6th Circuit concluded that counsels' performance fell below an "objectively reasonable standard of professional conduct."

The 6th Circuit also found that Powell was prejudiced by his counsels' deficient

performance at the penalty phase of the trial. At one point in the mitigation hearing, Dr. Schmidtgoessling testified that “it was a good thing that Powell was not bigger, heavier, or smarter, or he would be more dangerous.” In the prosecutor’s closing argument in the penalty phase of the case, he even cited a large portion of Dr. Schmidtgoessling’s mitigation testimony in support of the imposition of the death penalty.

During its deliberations, the jury informed the court that it was “at a stalemate” and could not agree whether to impose the death sentence. The jury’s apparent difficulty in reaching a decision regarding the appropriate penalty lead the 6th Circuit to conclude that if counsel had conducted a proper investigation and had presented competent proof of mitigation, there was a reasonable probability that the result would have been different. Accordingly, the court also issued the writ based on its conclusion that Powell was deprived of the effective assistance of counsel at the penalty phase of his trial.

United States v. Correa-Gomez, 328 F.3d 297 (6th Cir. 2003).

Correa-Gomez was charged with encouraging aliens to enter the United States illegally and then harboring them upon their arrival for “the purpose of commercial advantage.” After reviewing the manner in which immigration violations were investigated and prosecuted in the Eastern District of Kentucky, the district court concluded that Correa-Gomez was selectively prosecuted based upon his nationality. Accordingly, the district court dismissed the indictment on August 31, 2001.

On September 19, 2001, the government filed a motion urging the district court to reconsider its decision. However, the district court denied the government’s motion on November 30, 2001. Although the district court denied the government’s motion on its merits, it first found that the government’s motion for reconsideration was untimely as it was not filed within ten days of the court’s decision as required by Fed. R. Civ. P. 59(e) which governs motions to “alter or amend.”

The government appealed to the 6th Circuit where Correa-Gomez argued that

because the government’s motion for reconsideration was not filed in a timely manner, the 30 day period within which the government must file a notice of appeal began running from the date on which the district court filed its dismissal order and not when the district court denied the government’s motion for reconsideration. Therefore, Correa-Gomez posited that the government’s notice of appeal was not timely filed and its appeal should be dismissed.

The 6th Circuit ruled that a motion for reconsideration or rehearing of a final judgment in a criminal case must be filed within the time period provided by Fed. R. App. P. 4(b)(1) unless the local rules of the district court provide otherwise. This means that criminal defendants must file these motions within 10 days and the government must file these motions within 30 days of the entry of judgment. Accordingly, the 6th Circuit ruled that the government’s motion for reconsideration was timely filed and its notice of appeal was also filed timely because it was filed within 30 days of the district court’s denial of the government’s motion for reconsideration.

However, in an unpublished appendix to the opinion, the 6th Circuit summarily affirmed the district court’s conclusion that Correa-Gomez was the victim of selective prosecution and it affirmed the dismissal of the indictment.

Bugh v. Mitchell, —F.3d—, 2003 WL 21057039 (6th Cir. 2003).

In January 1989, Bugh’s four-year old daughter, Robin, told her mother, Carolyn, that Bugh had sexually assaulted her. Consequently, Bugh was indicted for one count of rape in violation of the Ohio Revised Code and tried by a jury. Bugh was convicted and he was unsuccessful on direct appeal.

Thereafter, Bugh filed a § 2254 petition setting forth the following claims for relief: (1) the admission of Robin’s hearsay statements through four adult witnesses violated his right of confrontation; (2) the admission of testimony concerning Bugh’s prior acts of molestation denied Bugh of his right to a fair trial in violation of the Due Process Clause; and (3) Bugh was denied the right to the effective assistance of counsel.

The district court denied Bugh habeas relief and certified these three claims for appeal to the 6th Circuit.

Because Bugh's habeas petition was filed after the enactment of the AEDPA, the new regime applied to the adjudication of his petition. Accordingly, in order to be granted habeas relief, Bugh was required to establish that the state court's adjudication of his claims either resulted in a decision that was: (1) "contrary to or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States;" or (2) "based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceeding."

A state court decision is "contrary to" clearly establish federal law "if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts." In contrast, an "unreasonable application of" clearly established federal law occurs when the state court identifies the correct governing legal principle from the Supreme Court decisions but unreasonably applies that principle to the facts of the prisoner's case.

In a pretrial hearing, the trial court declared that Robin was competent to testify at trial. Nonetheless, despite being deemed "competent," Robin answered non-verbally through much of her examination. Robin testified while sitting on her mother's lap and merely stated that "daddy touch my privates" and that this act occurred in "mommy's bedroom." Therefore, at Bugh's trial, Robin did not testify that she engaged in sexual conduct with Bugh.

However, over Bugh's objection, four adults (Carolyn, a friend, and two therapists) testified about statements that Robin made in which she told the adults about sexual conduct that she had with Bugh. Bugh maintained that his right of confrontation was violated when the trial court allowed the four adults to testify as to Robin's out-of-court statements that referenced the sexual assault.

An Ohio appeals court concluded that

Robin's statements to the four adults who testified at Bugh's trial were admissible under Ohio R. Evid. 803(2) as "excited utterances" because her statements related to a "startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." The Ohio appellate court noted that there was a "clear judicial trend in Ohio to recognize a liberalization of the requirements for an excited utterance when applied to young children victimized by a sexual assault."

Moreover, the Ohio appellate court ruled that the statements were also admissible under Ohio R. Evid. 801(D)(1)(c) which is a hearsay exception for statements of a prior identification. Under Ohio R. Evid. 801(D)(1)(c), a statement is not hearsay if the declarant testifies at trial and the statement is one of identification of a person soon after perceiving him, if circumstances demonstrate the reliability of the prior identification.

The district court adjudicated this habeas claim based on *United States v. Owens*, 484 U.S. 554 (1988) wherein the Court held that the Confrontation Clause does not bar the admission of prior, out-of-court statements of identification when a witness is unable to explain the basis for the prior identification. In *Owens*, the Court explained that the Confrontation Clause "guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent the defendant might wish." Consequently, the district court found that Bugh's confrontation rights were not violated because Robin was present at trial and Bugh had the opportunity to cross-examine her as well as the other witnesses who testified about her statements.

The 6th Circuit began its analysis by noting that in its decision, the Ohio appellate court did not identify the controlling Supreme Court precedent upon which it relied to reach its decision. Under these circumstances, the 6th Circuit held that it was obligated to apply the "contrary to" rather than the "unreasonable application of" prong of § 2254 because the state court did not correctly identify the governing legal principle that was to be applied to adjudicate this case.

The 6th Circuit concluded that the state court's decision was not "contrary to" clearly established Supreme Court precedent. Bugh's counsel's cross-examination of Robin may not have yielded the desired answers and Robin may not have recalled the circumstances surrounding her previous statements; nonetheless, the court held that "all of the elements of the confrontation right identified by the Supreme Court were satisfied in this case: Robin was physically present in court and confronted the accused face to face; Robin was competent to testify and she testified under oath; Bugh retained the full opportunity to cross-examine Robin; and the judge, jury, and Bugh were able to view Robin's demeanor and body language as she testified.

The second issue considered by the 6th Circuit was whether the admission of evidence concerning similar uncharged acts of child molestation by Bugh violated his due process right to a fair trial. Sixteen year old Keith Stout testified that when he was six, Bugh was his stepfather and they lived under the same roof. Stout testified that, during this time, Bugh performed oral sex on him.

Dr. Rick Thomas also testified about "other acts evidence." Dr. Thomas employed Bugh as a handyman and during the course of this employer/employee relationship, Thomas confronted Bugh after Thomas' daughter revealed that Bugh had sexually assaulted her. The trial court did not allow Thomas to testify as to what his daughter said about Bugh; however, the court did allow Thomas to testify about a confrontation between the two men in which Bugh told Thomas that he "felt bad about the situation and that he had sought counseling."

The trial court admitted the testimony of Thomas and Stout because Bugh had placed the identity of Robin's assailant at issue during the trial. Moreover, the trial court gave the jury a limiting instruction in which it stated that Bugh's "bad acts" could only be considered to "determine the existence of purpose, motive, scheme, plan or system, or absence of mistake or accident." Finally, the jury was instructed that it could not consider the "bad acts" as any "proof whatsoever that the defendant did any act alleged in the indictment in this case."

The state appellate court concluded that the "bad acts" evidence was admissible. The district court ruled that it was not authorized to award habeas relief even if the "bad acts" evidence was admitted in violation of the Ohio law because "errors in the application of state law, especially with regard to the admissibility of evidence, are usually not cognizable in federal habeas."

The 6th Circuit found that when an evidentiary ruling is so egregious that it results in a denial of "fundamental fairness," it may violate due process and thus warrant habeas relief. Nonetheless, courts have defined the category of infractions that violate "fundamental fairness" very narrowly. Generally, "state court evidentiary rulings do not rise to the level of due process violations unless they offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

The 6th Circuit concluded that there was no clearly established Supreme Court precedent which holds that a state violates due process by admitting "bad acts" evidence. Consequently, the decision of the trial court to admit "bad acts" evidence was not contrary to clearly established Supreme Court precedent.

Finally, Bugh alleged that his right to the effective assistance of counsel was violated when his trial attorney failed to pursue an independent psychological examination of Robin in order to determine whether she was fantasizing or had been programed to make the sex abuse allegations. Before trial, counsel sought an independent psychological examination of Robin. The trial court, without granting or denying the motion, asked counsel to submit a name and resume of an expert for the court's consideration. However, the trial court made it clear that it would not delay the trial in order for Bugh to be evaluated.

Bugh's trial counsel testified at an evidentiary hearing that he told Bugh to set up a psychological examination for Robin. However, eight days before the trial, Bugh informed his counsel that he was unable to schedule a timely appointment. When counsel learned that an evaluation would not be possible before the trial date, he did not pursue the issue or request a continuance of

the trial.

In order to prevail on an ineffective assistance of counsel claim, Bugh must prove that his counsel's conduct fell below an objective standard of reasonableness and that he was prejudiced by the performance. The district court concluded that Bugh's trial counsel decided that the psychological examination of Robin was not essential to his defense. Instead, counsel focused his efforts on limiting the evidence admitted against Bugh and discrediting the testimony of Robin's mother.

In the 6th Circuit, Bugh argued that the district court erred in concluding that counsel had strategic reasons for failing to pursue the examination of Robin. The court concluded that Bugh did not overcome the "presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Moreover, the court ruled that even if Bugh demonstrated that his counsel's performance was deficient, he did not demonstrate that he was prejudiced by the alleged deficiency. Instead, the 6th Circuit ruled that the physical evidence of sexual abuse would have prevented a successful defense that Robin was fabricating these allegations. Consequently, the 6th Circuit concluded that the state court's decision on the ineffective assistance of counsel claim was not contrary to clearly establish Supreme Court precedent.

United States v. Treadway, —F.3d—, 2003 WL 21106271 (6th Cir. 2003).

One of Treadway's co-defendants, Richard Pinkley, imported substantial quantities of marijuana, amphetamine, and methamphetamine from California and Texas. Treadway obtained ounce quantities of methamphetamine and pound quantities of marijuana from Pinkley and distributed them in Tennessee.

Several informants made purchases of marijuana and methamphetamine from Treadway. When Treadway was arrested at his home, he permitted agents to search the premises and they recovered 250 grams of marijuana as well as an assortment of ammunition. Treadway was later indicted for numerous violations of the federal narcotics and firearms statutes.

Treadway retained Charles Agee as his counsel. Shortly thereafter, the government raised a potential conflict of interest because one of Agee's former clients was going to testify against Treadway if the case went to trial. Although Agee did not file a written motion to withdraw as counsel, he was permitted to withdraw by the district court. The same day that Agee withdrew, Treadway retained James Shaeffer as new counsel.

The plea agreement that Treadway and Shaeffer reached with the government stated that "the government agrees to recommend that the defendant's base offense level pursuant to § 2D1.1 of the sentencing guidelines be calculated using the following drug quantities: (1) at least 500 grams but less than 1.5 kilograms of methamphetamine and (2) 400 pounds of marijuana." At the plea hearing, the government disclosed the evidence that it would have presented had Treadway's case gone to trial. The AUSA indicated that the evidence would show that Treadway purchased quantities of methamphetamine and marijuana from Pinkley. Moreover, informants made numerous drug purchases directly from Treadway.

At the plea hearing, Treadway admitted that he sold substantial quantities of methamphetamine and marijuana to both informants as well as non-informants. After considering the government's statement of facts as well as Treadway's admissions, the district court announced "that's a sufficient factual basis to support convictions on the counts to which you're pleading guilty."

Treadway's presentence report recommended a base offense level of 32 based on the drug quantity outlined in the plea agreement. Treadway's base offense level was reduced three levels for his acceptance of responsibility. Based on Treadway's criminal history category of IV and an offense level of 29, his sentencing range was 121-151 months.

However, the government moved for a three level downward departure because of Treadway's cooperation. The district court granted the government's motion and departed downward three levels which reduced Treadway's sentencing range to 92-115 months. Treadway was sentenced to serve

100 months imprisonment and he filed a timely notice of appeal.

On appeal, Treadway raised two issues. First, Treadway argued that the presentence report erroneously stated that he “stipulated” to the drug quantities contained in the plea agreement. Treadway maintained that he never “stipulated” to the drug quantities and that the agreement specifically preserved his right to “argue any mitigating factors.”

The 6th Circuit noted that the probation officer who authored the presentence report mistakenly concluded that Treadway “stipulated” to a drug quantity. The language in the plea agreement made it clear that the government was merely “recommending” drug quantities as opposed to the parties “stipulating” to drug quantities. Nonetheless, that misstatement did not undermine the district court’s conclusion regarding the amount of drugs for which Treadway should be held accountable.

The government’s recommendations in the presentence report, when compared to the drug quantities alleged in the indictment, represented a concession by the government that favored Treadway. This recommendation was accepted by both the probation officer as well as the district court; however, the plea agreement did not bind Treadway to the stated drug quantities. Treadway could have offered evidence that he should have been accountable for a lesser quantity. Nonetheless, Treadway neither objected to the drug quantities reported in the presentence report nor took issue with the district court’s relevant conduct determination.

The 6th Circuit concluded that Fed. R. Crim. P. 32(c)(1) does not require a district court to make independent drug quantity findings in every case. Instead, the district court may rely exclusively on the presentence report to determine drug quantity if the report contains a quantity analysis and the defendant does not object to the quantity determinations therein.

The 6th Circuit found that both Rule 32(c)(1) as well as USSG § 6A1.3 did not permit the district court to rely solely on the presentence report to arrive at the appropriate base offense level when the facts of the case are in dispute. However, when the facts are

not in dispute, as in the case *sub judice*, the district court can rely exclusively and entirely on the presentence report in arriving at a drug quantity.

Secondly, Treadway also advanced 6th Amendment and due process claims because of Agee’s withdraw as counsel. The 6th Amendment prohibits a court from unreasonably denying a defendant of his counsel of choice. Although there is a presumption in favor of a defendant’s chosen counsel, “that presumption may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict. The evaluation of the facts and circumstances of each case must be left to the informed judgment of the trial court.”

While the 6th Amendment affords the right to counsel of one’s choosing, the essential aim of the 6th Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.

The 6th Circuit ruled that in Treadway’s case, the district court did not act unreasonably in allowing Agee to withdraw due to his potential conflict of interest. If the case had proceeded to trial, Agee would have been unable to effectively cross-examine one of the government’s key witnesses due to his prior representation of the witness.

Treadway also argued that he was denied due process when the district court failed to hold a hearing regarding Agee’s motion to withdraw. The 6th Circuit ruled that in the ordinary course, a criminal defendant should have notice and an opportunity to be heard when his attorney of choice seeks to withdraw as counsel of record. Moreover, the local rules for the Western District of Tennessee require the filing of both a motion to withdraw and a court order permitting counsel to withdraw. However, this procedure was not followed in this case. Instead, while Treadway was absent, Agee was permitted to withdraw after orally moving the district court for this relief.

The 6th Circuit ruled that the failure to provide Treadway with an opportunity to be heard on Agee’s motion to withdraw was plain error. Nonetheless, the court affirmed

Treadway's conviction because he did not suffer prejudice from this error because he retained Schaeffer the same day that Agee withdrew. Accordingly, Treadway's conviction and sentence were affirmed.

United States v. Ridge, —F.3d—, 2003 WL 21134680 (6th Cir. 2003).

An informant told Officer Nicholson that Thomas Stocklem was operating a methamphetamine laboratory. This information lead Nicholson to secure and execute a search warrant on Stocklem's home. The officers executing the warrant discovered a methamphetamine laboratory in Stocklem's basement. While the officers were executing the warrant, Stocklem received a call on his cell phone. Detective Prichard answered the phone and was given the message that "Danny's on the way with the money." Prichard told the caller, "Okay, we'll be waiting" and the call was terminated.

When Prichard related the conversation to the other officers on the search warrant team, they concluded that the caller was referring to Danny Baker. This conclusion was based on the fact that in a debriefing, Nicholson's informant mentioned that Baker cooked methamphetamine in Stocklem's laboratory. The officers also knew that Baker was armed during a previous arrest.

After the call, several officers left the residence and hid in an area surrounding the driveway. Twenty minutes after the phone call, a van driven by Baker entered Stocklem's driveway. Andy Ridge was a passenger in the vehicle and both Baker and Ridge were removed from the vehicle once it stopped. As Ridge exited the vehicle, Nicholson observed a pistol on the passenger seat where Ridge was seated. Once Baker and Ridge were out of the vehicle, the officers observed drug paraphernalia and narcotics in the vehicle.

Baker and Ridge claimed that they had an innocent purpose for going to Stocklem's house. Consequently, both men filed a motion to suppress evidence seized as a result of the officers' stop of the van. The district court denied the motions after concluding that "given the information the officer's had about Danny Baker carrying a gun in the past, his involvement in methamphetamine, and the fact that drug dealers often carry weapons, the

officers had a reasonable belief, based on specific and articulable facts, that the occupants of the van might be armed and dangerous."

Ridge entered a conditional guilty plea to drug and firearms charges and after sentence was imposed, he perfected a timely appeal of his 4th Amendment claim. Baker appealed the district court's application of the sentencing guidelines to his case.

When an officer conducts a brief investigatory stop of a person or a vehicle, the 4th Amendment is satisfied if the officer's action was supported by reasonable suspicion to believe that criminal activity may be afoot. "As long as a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger, an officer need not be certain that an individual is armed."

In this case, the officers were executing a search warrant in a residence housing a methamphetamine laboratory where Baker was a known cooker. Moreover, the officers knew that "Danny was on his way with the money" and when "Danny" was arrested on a prior occasion, he was armed. Because the officers were searching a suspected methamphetamine lab, 6th Circuit precedent permitted the officers to infer that people arriving on the premises were either customers or distributors. Consequently, the agents had reasonable suspicion that anyone arriving on the premises during the search was "involved in criminal activity." Thus, the district court's denial of Ridge's motion to suppress was affirmed.

Additionally, Baker argued that his sentence should be vacated because the district court considered the possibility of a post-sentence Fed. R. Crim. P. 35 reduction when assessing the government's §5K1.1 motion for a downward departure. Although the 6th Circuit normally does not have jurisdiction to evaluate a § 5K1.1 departure, it does have jurisdiction to determine whether the district court's reduction of sentence "represented the exercise of discretion envisioned by § 5K1.1."

Under the guidelines, the sentencing judge has an obligation to respond to a § 5K1.1 motion and to state the grounds for

action at sentencing without regard to future events. “The prospect of Rule 35(b) relief in the future cannot be allowed to alter and influence decisions of the prosecution, or the deliberations of the court, at sentencing.” However, the district court’s mere mention of possible future cooperation or the possibility of filing a Rule 35 motion does not invalidate the district court’s adjudication of a motion for downward departure under § 5K1.1.

When a defendant challenges the district court’s ruling on a § 5K1.1 motion on the ground that the district court’s contemplation of future cooperation contaminated its decision on the § 5K1.1 motion, the court of appeals’ task is to examine the text and context of the record to determine whether the prospect of Rule 35(b) relief in the future “altered or influenced the trial judge’s deliberations at sentencing.”

In this case, after ruling on the government’s § 5K1.1 motion, the district court mentioned the possibility of a post-sentencing reduction pursuant to Rule 35, indicating that “should the government file a Rule 35 motion based on your substantial assistance in other cases, the court will look very favorably upon that.” Baker was also instructed that “you can expect to get a further reduction in your sentence should that occur.” Baker argued that this dialogue proved that the district court withheld additional discretion to reduce his sentence conditioned on his future cooperation.

However, the 6th Circuit ruled that the district court simply referred to the possibility that the government might move for an additional reduction of sentence if Baker continued to provide substantial assistance. The district court did not reserve or intend to reserve its discretion over sentencing. Consequently, the 6th Circuit held that the district court did not improperly exercise its authority under § 5K1.1 by considering the possibility of a post-sentence reduction.

Finally, Baker asked the 6th Circuit to review the district court’s refusal to depart downward pursuant to USSG § 5K2.0 because of a combination of factors that, he believed, took his case outside of the “heartland of guidelines.” After hearing Baker’s argument about why his case was not within the

“heartland of the guidelines,” the district court denied his motion and found that “the court does not find that Mr. Baker’s case is atypical; that is, the court does not find that his case is outside the heartland of cases described in the guidelines.”

Section 5K2.0 permits a downward departure from the otherwise applicable guideline range in the following circumstance: “the Guidelines Manual provides that a sentencing court should treat each guideline as carving out a heartland, a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted.”

The 6th Circuit reviewed the record and ruled that the district court was fully aware of its authority to depart downward and simply decided that a departure was not appropriate under the circumstances. Consequently, the court concluded that it did not have jurisdiction to review the district court’s decision not to depart downward pursuant to § 5K2.0.

United States v. Dotson, —F.3d—, 2003 WL 21134500 (6th Cir. 2003).

In April 1999, Rogerico Johnson was an Ohio prisoner who had an initial parole eligibility hearing. According to the Ohio Revised Code, a parole eligibility hearing must be conducted by the parole board or by at least one member of the parole board and one parole board hearing officer. In Johnson’s case, the hearing was conducted by only one parole board member.

At the hearing, the parole board member did not allow Johnson to speak on his own behalf, although the Ohio Revised Code requires her to consider his oral or written statements. Moreover, the parole board member neither asked Johnson any questions nor allowed him to ask any questions. Finally, the parole board member based her decision to deny Johnson parole on two alleged convictions for offenses for which Johnson was never even charged.

After his experience in this kangaroo court, Johnson filed a § 1983 claim

challenging the parole hearing procedure, but not the denial of parole. The district court dismissed Johnson's suit for failing to state a claim after concluding that the rule announced in *Heck v. Humphrey*, 512 U.S. 477 (1984) precluded his claim.

William Dotson was convicted of aggravated murder in 1981. Under the regulations in place in 1981, Dotson was not eligible for parole for 15 years. If Dotson was denied parole, the parole board would be required to give him another hearing within five years. Dotson was denied parole initially, and the parole board set his next hearing for 10 years later, with a half-way point evaluation in five years. This schedule complied with the regulations in effect when Dotson was sentenced.

However, before the five years lapsed, the Ohio regulations changed and the new parole rules dictated that an individual convicted of aggravated murder was not eligible for parole for at least 32 years. Dotson attended his half-way review that was scheduled under the regulations in place at the time of his conviction. At that review, the parole board decided that the new rules applied retroactively and announced that Dotson would not be eligible for parole until 2007. Moreover, the parole board made a determination about Dotson's parole eligibility, not his parole suitability, as required by the old regulations.

Dotson also filed suit under § 1983 wherein he challenged the parole hearing procedures and not his parole eligibility. The district court also dismissed Dotson's claim after finding that it was not cognizable under § 1983. Both Dotson and Johnson appealed the dismissal of their § 1983 actions to the 6th Circuit.

Federal habeas corpus litigation brought pursuant to § 2254 is the exclusive avenue for challenging the fact or duration of a prisoner's confinement; however, civil rights actions filed pursuant to § 1983 are available to challenge the conditions of that confinement. The issue presented to the 6th Circuit asked under what circumstances a prisoner may use a § 1983 action, rather than a § 2254 petition, to challenge the procedures used at a parole eligibility hearing?

The court found that although Dotson challenged his parole eligibility determination and Johnson challenged his parole release determination, the success of either challenge would merely result in a new hearing that would be conducted in compliance with Ohio law. However, under Ohio law, the award of parole is discretionary; therefore, the impact that these new hearings would have on the parole or release of either Johnson or Dotson would be indeterminate.

Because the ultimate impact of these new hearings on the continued confinement of Dotson and Johnson was unclear, the 6th Circuit could not say that a successful § 1983 action that resulted in a new discretionary parole hearing "necessarily implied" the invalidity of either plaintiffs' conviction or sentence. A successful challenge will only "necessarily imply" the invalidity of a prisoner's conviction or sentence if it would inevitably or automatically result in early release. The challenge to the loss of good time credits is an example of such a challenge.

Where the ultimate parole determination is discretionary, it would be difficult to predict any likely consequence of the parole determination hearing. Consequently, the 6th Circuit ruled that procedural challenges to parole eligibility and parole suitability determinations do not "necessarily imply" the invalidity of the prisoner's conviction or sentence and, therefore, can be brought as civil rights actions under § 1983 rather than pursuant to a petition for habeas corpus relief. Accordingly, the dismissal of the § 1983 actions filed by Dotson and Johnson was reversed.

United States v. Daniel, —F.3d—, 2003 WL 21197336 (6th Cir. 2003).

In 1997, Daniel was the owner and operator of Business Management Systems (BMS) which was a payroll services company located in Roanoke, Virginia. A business employing BMS would send BMS the lump-sum amount owed to the business's employees a few days before each payday. During the time between an employer's initial deposit and the employees' withdrawals, BMS would deposit the money into "Client Account 10" and invest the money in conservative investments. The reason that the investments

were conservative was because the clients' money had to be available when it was time to pay out.

In August 1997, BMS was purchased by Century Business Services, Inc. (CBIZ), a holding company engaged in the business of acquiring accounting and payroll management corporations. BMS was renamed Century Payroll, Inc. (Century) and Daniel remained with the company and continued his former duties. To compensate him for the sale of BMS to CBIZ, Daniel received \$2.7 million dollars worth of CBIZ stock.

Daniel placed his CBIZ shares in a margin account with the investment firm, Davenport & Co. Under the terms of his account, Daniel could purchase additional stock or withdraw cash from Davenport on credit, using as collateral his equity in the existing investments managed by Davenport. When the value of Daniel's equity in his investments fell below a certain level (this would happen if the value of his CBIZ stock declined) then Davenport would send him a "margin call" requiring him to repair his equity by either selling the stock or by paying cash into his account. Daniel kept his CBIZ stock and bought more CBIZ stock on margin.

Beginning in October of 1998, the value of CBIZ stock began to fall and Davenport issued Daniel a margin call. However, instead of selling his CBIZ stock, Daniel approached Century controller Robert St. Lawrence and had him draw a check payable to Daniel for \$199,750 from Client Account 10. This was listed as a loan on Century's investment worksheet and the accounts receivable column listed the interest accrued on the loan.

Though CBIZ headquarters could have found the loan amount listed in the financial statements submitted by Century, the latter's monthly and yearly statements would not ordinarily specify with whom the money was invested. The monthly statement did list the interest accrued on the loan as income to Century, but Daniel's name was not listed, and only his initials were placed next to this entry. St. Lawrence had some familiarity with Daniel's personal finances and knew that he was "well-off," so he did not see the loan as contravening the company policy of investing

Client Account 10's funds conservatively.

Daniel bought more CBIZ stock on margin and as the value of the stock declined throughout 1998 and 1999, Davenport issued a series of margin calls. On March 16, 1999, Daniel approached Jennifer Duff, who had replaced St. Lawrence as Century's controller, and asked for a blank check from Client Account 10. Duff gave Daniel the check and Daniel used it to deposit \$300,000 into his Davenport account. Century's vice-president, Geoff Duke, heard about the check from Duff and questioned Daniel about it. Daniel informed Duke that he invested the money as a corporate investment on Century's behalf.

In July of 1999, Daniel withdrew \$200,000 from his Davenport account and deposited it with Century as repayment for the initial \$199,750 loan. This payment covered only \$250.00 of the accrued interest and Duff sent Daniel an e-mail asking when the balance of the interest would be repaid. Daniel responded that "this would be no problem. I will give you that at a later date when I pay off the other."

In September 1999, Daniel had Duff write a check to him for \$259,000 from Client Account 10. Daniel explained to Duff that the check was to be made payable to him individually because due to his personal relationship with his broker at Davenport, he could get a better interest rate. This was a lie; however, because Duff trusted Daniel, he was satisfied with this explanation.

Duke, on the other hand, was not satisfied and was upset that Davenport was not sending Century regular investment statements. After the \$259,000 check issued, Duke asked Daniel about the status of these investments and Daniel gave him the same explanation that he had given Duff. Duke was skeptical of the explanation and sent Daniel an e-mail wherein he observed that "it was fine to invest Century's Client Account 10 money with Davenport if it was safe, it was not permissible to put client money to personal use."

Duke stated that Daniel was "upset with this e-mail because he felt like I was accusing him of doing something wrong." Eventually, Daniel admitted to Duke that he invested the money in CBIZ stock for personal

purposes but stated that he was an “insider” and could not sell his stock.

When Duke asked Daniel if he had permission to take out the loans, Daniel told Duke that people at CBIZ headquarters “did not know the details,” but that they told him that he should do whatever was necessary to meet his margin calls and keep Davenport from selling his CBIZ stock. Duke succeeded in getting Daniel to sign a \$570,000 promissory note for the amounts that were owed at that time. However, over the course of the next four months, Daniel had Duff issue eight more checks from Client Account 10 with an aggregate value of almost \$2.9 million dollars. Daniel even persuaded Duff to issue a \$1.5 million dollar check when he knew that Duke would be out of town. Daniel signed promissory notes for each loan but he repaid only \$350,000.

On April 24, 2000, Duke again confronted Daniel and asked for written proof that CBIZ had authorized Daniel’s withdraws. Daniel offered to put up collateral for the loans and he agreed to have CBIZ send written authorization. Accordingly, Daniel called CBIZ’s CFO, Charles Hamm, and lead him to believe that Daniel needed a letter verifying that he was employed by Century for purposes of obtaining a loan. However, Daniel did not make it clear that the loan was from Century.

Hamm, assumed that the loan was from some other entity and he told Daniel to draft a letter and send it to him for his signature. Daniel sent a fax to Hamm, which Hamm’s assistant typed verbatim on CBIZ letterhead. The letter was addressed to Century and read “I’ve been advised by Ralph Daniel concerning the loan made to him for \$3,000,000 plus accrued interest.”

After reading the letter, Hamm realized that Daniel had taken the loan from Century itself and he refused to sign the letter. Because CBIZ did not allow employees to borrow money without prior authorization, Hamm felt that Daniel had no authorization to take the money. Hamm did not fax the letter back and when Daniel called later that day asking about it, Hamm informed Daniel that “this could be an issue.”

It became an issue when Daniel was indicted for wire fraud in violation of 18

U.S.C. § 1343. A jury convicted Daniel after the district court denied his motion for a judgment of acquittal. Daniel was sentenced to prison and ordered to pay restitution. Daniel then filed a timely notice of appeal.

The issue adjudicated by the 6th Circuit was whether there was sufficient evidence to support a guilty verdict for wire fraud. To convict a defendant of wire fraud, the government must prove: (1) a scheme or artifice to defraud; (2) use of interstate wire communications in furtherance of the scheme; and (3) intent to deprive a victim of money or property.

A scheme to defraud includes any plan or course of action by which someone intends to deprive another, by deception, of money or property by means of false or fraudulent pretenses, representations, or promises. An element of the scheme or artifice to defraud requires the government to prove that the defendant said something materially false. However, the government is not obligated to prove that the fraud victim actually relied on the material misrepresentation because the actual success of the scheme to defraud is not an element of wire fraud.

The 6th Circuit concluded that a reasonable jury could have found that Daniel knowingly made several misrepresentations. First, Daniel told Duff that he was making investments on behalf of Century and that by putting money into his own account, he could obtain a more favorable interest rate. Moreover, Daniel told Duke that the first loan was a corporate investment made on Century’s behalf. This allayed Duke’s concerns for several months and it was only after the third loan that Duke inquired further. Thus, Daniel made a number of material misrepresentations which supported the government’s proof of this element.

Next, the 6th Circuit considered whether the government produced sufficient evidence to show that Daniel acted with the intent to defraud. To convict a defendant of wire fraud, the government must prove specific intent, meaning “not only that a defendant must knowingly make a material misrepresentation or knowingly omit a material fact, but also that the misrepresentation or omission must have the

purpose of inducing the victim of the fraud to part with property or undertake some action that he would not otherwise do absent the misrepresentation or omission.”

Daniel’s misrepresentations intended to get Century to loan him money that it otherwise would not have loaned. Client Account 10 contained client funds which would normally be treated with special care because the money did not belong to Century. Daniel knew that Century’s policy was to invest those funds conservatively. Moreover, CBIZ’s policy was to not allow employees to take personal loans from client funds. Consequently, the government established that Daniel intended to deprive Century of money in the short term and thus it met its obligation to prove this element.

The final element evaluated by the 6th Circuit was whether the fax, that Daniel sent to Hamm, was sufficient evidence of the use of an interstate electronic communication device to further the scheme to defraud. The wire fraud statute requires the wire communication to be employed “for the purpose of executing such scheme or artifice.” This means that the communication must be sufficiently related to the scheme, which is to say that the scheme’s completion or the prevention of its detection must have depended in some way on the charged communication.

Communications occurring after the receipt of goods obtained by fraud are within the sweep of the wire fraud statute if they were designed to “lull the victims into a false sense of security, postpone their ultimate complaint to the authorities, and therefore make the apprehension of the defendants less likely than if no communications had taken place.”

Daniel maintained that the “lulling theory” did not apply because his fax to CFO Hamm did not “lull” anyone’s concerns; instead, the fax revealed Daniel’s activities and led to his exposure. However, the 6th Circuit found that the relevant inquiry was whether Daniel intended the letter to lull concerns, and it mattered not that the letter turned out to have the opposite effect. Consequently, the 6th Circuit concluded there was a surfeit of evidence to support Daniel’s

conviction and affirmed the district court’s denial of his Rule 29 motion.

United States v. Wheeler, —F.3d—, 2003 WL 21202700 (6th Cir. 2003).

On December 18, 1995, Wheeler was sentenced to serve ten years of community corrections supervision for a felony violation of Tennessee law. While Wheeler was serving his community corrections sentence, a police officer executed a search warrant at Wheeler’s home which yielded numerous firearms. This discovery led to the revocation of Wheeler’s community corrections supervision and his incarceration for at least “30% of ten years in Tennessee prison.”

Moreover, the firearms discovered during the search served as a basis for a federal prosecution because Wheeler was a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Wheeler plead guilty to the firearms charge and his case was referred for the preparation of a presentence report.

Based on Wheeler’s well-developed criminal record and his possession of multiple firearms, the probation office recommended an offense level of 26 pursuant to U.S.S.G. §§ 2K2.1(a)(2) and (b)(2). Moreover, the probation office recommended a three-level reduction of Wheeler’s base offense level for his acceptance of responsibility.

Additionally, the probation officer recommended a criminal history category of IV based on Wheeler’s eight criminal history points. The probation officer scored Wheeler’s 1995 conviction as a three point conviction because after his community corrections supervision was revoked, he was sentenced to serve more than 13 months in prison. Two additional points were scored for the 1995 conviction because the violation of federal law occurred while Wheeler was on supervision to the Tennessee criminal justice system.

Wheeler maintained that he only should have received one criminal history point for the 1995 conviction. In making this argument, Wheeler relied on the definition of “prior sentence” found in § 4A1.2 cmt. n. 1 which provides, in pertinent part, that: “prior sentence means a sentence imposed prior to

sentencing on the instant offense, other than a sentence for conduct that is part of the instant offense. . . Conduct that is part of the instant offense means conduct that is relevant conduct to the instant offense under the provisions of § 1B1.3.”

Wheeler argued that the possession of firearms underlying the revocation of his community corrections supervision was conduct relevant to the § 922(g)(1) conviction. Under the guidelines, only “prior sentences” are considered in calculating criminal history points. According to Wheeler, because the guidelines exclude “relevant conduct” from the definition of “prior sentence,” the district court should consider only his original community correction sentence, and not his post-revocation sanction, as a “prior sentence” in calculating his criminal history points for the 1995 conviction.

The district court rejected Wheeler’s position and imposed sentence. Wheeler then perfected a timely appeal and the issue raised in the 6th Circuit involved the district court’s application of the guidelines to his case.

USSG § 4A1.2(k)(1) provides that any term of imprisonment imposed upon revocation is added to the original term of imprisonment for purposes of calculating criminal history points under § 4A1.1(a)-(c). Even though this is seemingly straightforward, Wheeler maintained that when revocation-triggering conduct serves as a basis for a separate criminal prosecution, the guidelines’ exclusion of relevant conduct from the definition of “prior sentence” trumps § 4A1.2(k)(1).

The 6th Circuit rejected this argument and concluded that a post-revocation sanction does not constitute a separate sentence; instead, a post-revocation sanction is an extension of or a replacement for the original sentence for a crime. Thus, regardless of the underlying conduct that brings about the revocation of a community corrections sentence, any and all post-revocation sanctions constitute part of the sentence for the original crime of conviction, even where the facts underlying the revocation are precisely the same as those providing the basis for a conviction in the instant case.

Consequently, the fact that Tennessee

authorities revoked Wheeler’s community correction sentence for the same firearms possession that led to his § 922(g)(1) conviction does not, for criminal history purposes, sever the conduct from the original state sentence attributable to his 1995 conviction.

The next issue raised on appeal was Wheeler’s contention that the district court violated the rule against double counting by using the same conduct, possession of firearms, to impose multiple punishments under the guidelines. This argument had some allure because the district court used Wheeler’s possession of firearms as a basis for the: (1) enhancement to his base offense level under § 2K2.1(a)(2); (2) assessment of two criminal history points under § 4A1.1(d); and (3) assessment of three additional criminal history points under § 4A1.1(a).

However, the 6th Circuit rejected Wheeler’s argument for two reasons. First, the guidelines applied by the district court emphasized different aspects of Wheeler’s conduct, other than firearm possession alone. Secondly, the guidelines that were applied involved double counting that was expressly authorized by the Sentencing Commission. The court concluded by stating that double counting is permitted when “it appears that Congress or the Sentencing Commission intended to attach multiple penalties to the same conduct.”

United States v. Ninety-Three (93) Firearms, —F.3d—, 2003 WL 21210444 (6th Cir. 2003).

In 1994, ATF and DEA agents executed a search warrant at Larry Short’s home and seized 93 firearms and a quantity of ammunition. Short was prohibited from possessing firearms and ammunition because of his prior felony convictions. The firearms that were possessed were subject to seizure and forfeiture under 18 U.S.C. § 924(d)(1). One month after the seizure, the ATF commenced administrative forfeiture proceedings against these firearms by publication in *USA Today*. In November of 1994, Short filed a letter requesting the return of his property. The ATF construed this letter as a petition for remission or mitigation and denied same.

Short was convicted of being a felon in possession of firearms and ammunition and on September 15, 1995, he was sentenced to serve 78 months in prison and three years of supervised release. On August 20, 1999, almost five years after the original seizure, the government instituted a judicial forfeiture action under § 924(d)(1) seeking forfeiture of Short's firearms.

Short filed a motion to dismiss the complaint and argued that the: complaint was not timely filed under § 924(d)(1); five year delay in filing the complaint violated his due process right to a prompt hearing; and action was barred by the Excessive Fines Clause. The district court partially denied Short's motion; however, the court was perplexed as to why it took the government six months to serve Short with a copy of the complaint. Consequently, the district court ordered the government to show cause for its delay in obtaining service on Short.

In response to the show cause order, the government admitted that it did not obtain service of process within the time constraints found in Fed. R. Civ. P. 4; however, after the show cause order was filed, a copy of the complaint was served upon Short's attorney, Logan Sharp, who the government claimed agreed to accept service on behalf of his client. Mr. Sharp took exception with the government's version of the facts and filed an affidavit with the court swearing that he neither agreed to accept service on behalf of Short nor did he represent Short in the forfeiture action.

Nonetheless, six months after the complaint was filed, the government served the complaint and a request for admissions on Short at his place of incarceration. However, Short did not respond to the request for admissions within the 30 day period. Moreover, neither the court nor the parties agreed to an extension of time. Consequently, Short's failure to respond was construed to be a constructive admission.

On July 12, 2000, Short was released from prison and a few months later, he requested the appointment of counsel for the forfeiture action. However, the district court denied Short's motion for the appointment of counsel. Shortly thereafter, the government

successfully moved for summary judgment and Short filed a timely appeal.

The first issue considered by the 6th Circuit was whether the government's judicial forfeiture action was filed timely. Title 18 U.S.C. § 924(d)(1) provides that: "**any** action or proceeding for the forfeiture of firearms or ammunition shall be commenced within 120 days of said seizure." Short argued that the government's complaint should be dismissed for lack of jurisdiction because it was not filed within the 120 day requirement. Short maintained that § 924(d)(1)'s meaning was unambiguous in that "any" refers to both administrative and judicial proceedings. Consequently, Short posited that both judicial and administrative forfeiture actions must be filed within 120 days of the seizure.

The 6th Circuit ruled that the word "any" in § 924(d)(1) was ambiguous. Proof of the ambiguity was evidenced by the disagreement over its meaning in the circuits that have considered this question. Some courts have read "any" to mean "either/or," while others have construed "any" to mean "all/every."

Because the statutory language was ambiguous, the 6th Circuit reviewed the entire text and structure of the statute and held that § 924(d)(1) does not mandate the filing of judicial forfeiture actions within 120 days of the seizure as long as an administrative proceeding has been filed within that time-frame. The rationale for this decision was that permitting the government to await a decision on the administrative forfeiture proceeding protects the courts from burdensome litigation, conserves economic resources, and preserves a claimant's opportunity for remission or mitigation. Because the administrative forfeiture proceeding was filed within 120 days of the seizure, the judicial forfeiture action filed within five years of the seizure was also filed timely.

The next question presented was whether the government's delay in filing the judicial forfeiture action violated Short's right to due process. The firearms were seized on August 26, 1994. In that same year, Short filed his petition for remission in which he asserted his right to the firearms. The petition for remission was denied and the government

did not begin its judicial forfeiture action until August 20, 1999.

However, Short's criminal action was pending during much of this period and the Supreme Court did not deny Short's petition for a *writ of certiorari* until June 27, 1997. Thus, the government delayed another two years before instituting the judicial forfeiture proceeding.

The balancing test in *Barker v. Wingo*, 407 U.S. 514 (1972), provided the framework used in determining whether the government's delay in filing its judicial forfeiture action violated Short's right to due process. Under *Barker*, the court must weigh four factors in determining whether a due process violation has occurred: "(1) the length of the delay; (2) the reason for the delay; (3) the claimant's assertion of his rights; and (4) the prejudice to the claimant."

None of these factors is "necessary" or "sufficient." Instead, these four factors are to be used as guides in balancing the interests of the claimant against those of the government. Recognizing that the test was not designed for scientific precision, the Supreme Court provided some guidance: "the length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance."

The 6th Circuit concluded that the delay in filing the complaint was both substantial and presumptively prejudicial. Consequently, the court analyzed the remaining three factors. The government proffered ample justification for its delay in filing. First, the government waited until a determination was made on Short's administrative petition for remission. Secondly, the government waited for a final result in Short's appeal of his criminal case.

The court next evaluated the third factor--Short's assertion of his right to the property. Soon after the warrant was executed, Short filed a petition for remission but he never requested the initiation of a judicial forfeiture action. Moreover, Short did not move for the return of his seized property under Fed. R. Crim. P. 41(e). Instead, Short's sole attempt to regain his property consisted of

a letter that he filed shortly after the seizure, which was interpreted as a petition for remission. Consequently, the 6th Circuit concluded that Short "did not desire an early judicial hearing."

Finally, the court ruled that Short failed to provide the court with any evidence of how the delay in bringing the judicial proceeding had prejudiced his defense. Accordingly, the court held that Short did not set forth a due process violation.

Short also alleged that the six month delay in serving him with the complaint violated his right to due process. The government obviously violated Fed. R. Civ. P. 4(n) by not serving the complaint within 120 days of its filing. Although Rule 4(n), by its express language, provides that the court "shall" dismiss an action when service is not effected within 120 days, it also provides some flexibility in that it allows a court to choose not to dismiss; but rather to extend the service time when good cause is shown.

In the present case, the district court requested the government to show cause as to why it did not serve Short within the allotted time. In response to the court order, the government acknowledged that a "miscommunication" resulted in the failure to serve Short in a timely manner. The district court did not expressly indicate that it chose to "extend the time for service for an appropriate period." However, the 6th Circuit held that it was obvious that the district court so chose because it did not dismiss the case. Instead, the district court allowed the case to proceed after reviewing the government's response to the show cause order. Consequently, Short did not suffer a due process violation due to the tardy service of the complaint.

The final issue litigated in this appeal was whether the district court erred by failing to alert Short to the consequences of a summary judgment motion and his responsibility to respond. Short maintained that because he was proceeding *pro se* after his request for the appointment of counsel was denied, he was unaware of the need to file affidavits and other responsive papers in opposition to the government's motion for summary judgment.

Although the majority of circuits have

held that a *pro se* litigant is entitled to notice of the consequences and requirements of the summary judgment rule, the 6th Circuit has consistently refused to apply this “special assistance” rule to non-prisoner *pro se* litigants. Moreover, even if the law did require Short to be clothed with this special protection, any error was “harmless.”

United States v. Townsend, —F.3d—, 2003 WL 21229301 (6th Cir. 2003).

In 2000, a Wal-Mart employee contacted the Milan, Tennessee Police Department and reported that two men had just purchased a large quantity of pseudoephedrine tablets, lithium batteries, and camping fuel. The police dispatcher notified Officer Williams of this tip and that the men were traveling in a white Blazer with the license plate number ESA106. Officer Williams located a vehicle matching this description which was traveling in the same direction as reported by the dispatcher.

The dispatcher also informed Officer Williams that the Blazer was registered to Townsend and that Townsend was someone who had “been involved in an explosion in a meth lab and had burnt himself.” Moreover, another Milan police officer related to Officer Williams that the Blazer had been stopped previously in relation to the theft of an ingredient used in the manufacture of methamphetamine.

Before stopping the vehicle, Officer Williams radioed his supervisor, related the information that he had, and asked the supervisor if he agreed that a traffic stop was appropriate. After receiving approval from his supervisor, Officer Williams activated his beacon lights and stopped the Blazer. Officer Williams approached the vehicle and saw the Wal-Mart shopping bags.

Townsend was the driver of the Blazer and he was asked to exit the vehicle. Officer Williams noticed that Townsend was nervous and had trouble talking. Moreover, Officer Williams observed a knife clipped to Townsend’s belt. Officer Williams then frisked Townsend and felt a long skinny object in his back pants pocket. At Williams’ request, Townsend produced the item, a part of an ink pen which contained a powdery residue. Officer Williams recognized the ink

pen component as a device that is commonly used for inhaling methamphetamine.

Officer Williams placed Townsend under arrest and then asked Townsend what was in his front pants pocket. Townsend produced keys, some change, and a plastic bag containing methamphetamine. Townsend was taken into custody and an inventory search of the Blazer yielded methamphetamine precursors as well as drug paraphernalia.

In the district court, Townsend unsuccessfully sought suppression of the physical evidence that was seized and he was eventually convicted of manufacturing methamphetamine. After sentence was imposed, Townsend appealed and litigated the reasonableness of the search and seizure.

Townsend challenged, as “unsubstantiated and unreliable,” the Wal-Mart employee’s tip regarding the purchase of ingredients commonly used to make methamphetamine. Townsend seized on Officer Williams’ testimony that “he did not talk directly with anyone from Wal-Mart but responded to a call from the dispatcher.” Officer Williams also did not “verify the original source” of the tip and Townsend even took issue with the dispatcher’s relay of information regarding Townsend’s previous involvement in a meth lab explosion.

In *United States v. Hensley*, 469 U.S. 221 (1985), the Court held that “the admissibility of evidence uncovered during a search incident to an arrest prompted by the circulation of a flier by another police department turns on whether the department which issued the flier had probable cause, not whether the officers who relied on the flier were aware of the specific facts supporting probable cause.”

Probable cause for an arrest requires that police have reasonably trustworthy information sufficient to warrant an officer of reasonable caution to believe that the arrestee committed, or was in the process of committing an offense, and further requires that officers articulate concrete and objective facts from which they infer criminal conduct. Police may initiate an investigatory stop on less than probable cause, but there must be, under the totality of the circumstances, “some objective manifestation that the person

stopped is or is about to be, engaged in criminal activity.”

The requirement of “reasonable suspicion” to justify the investigatory stop may be satisfied by an officer’s personal observations as well as the collective knowledge of the police. Based on a number of sources, Williams knew: (1) that Townsend had just bought a large quantity of ingredients known to be used in the manufacture of methamphetamine; (2) the color, model, and tag number of Townsend’s vehicle, as well as the direction in which it was traveling; (3) that the car had recently been involved in the theft of an ingredient used in the manufacture of methamphetamine; and (4) that Townsend had been involved in an explosion at a meth lab.

The 6th Circuit found that these factors provided Officer Williams with specific and articulable facts justifying the investigatory stop of the vehicle. The information developed during this traffic stop then provided the officers with probable cause to legitimate Townsend’s arrest. Consequently, the district court’s decision denying Townsend’s motion to suppress was affirmed.

United States v. Price, —F.3d—, 2003 WL 21241783 (6th Cir. 2003).

On May 5, 2001, agents executed a search warrant at a residence in Jackson, Tennessee. Price was inside the residence, opened the front door, and allowed the officers inside. In a bedroom, on the floor between the bed and the night stand, agents discovered a Lorcin pistol along with two clips of ammunition. Moreover, a Remington pistol was located in a dresser next to the night stand.

In the night stand, agents also found a document entitled “State of Tennessee Department of Safety Certificate of Completion for Handgun Safety Course.” The document was issued to Price on April 17, 2001 and reflected that he handled a Glock pistol to have the certificate issued. After his arrest, Price told the agents that the firearms and ammunition belonged to his wife, that he stayed in the residence only on the weekends, and that he “never touched those guns.”

Price was indicted for being a felon in possession of the Remington and Lorcin pistols, in violation of 18 U.S.C. § 922(g). At

trial, Price stipulated that he was a convicted felon at the time that the firearms were discovered during the search. However, Price disputed that he knowingly possessed the firearms that were discovered. During the trial, the defense presented testimony that: Price had not purchased the weapons, Price’s wife lived at the residence, and feminine items were found in the dresser along with the Remington.

In contrast, the government presented testimony that showed that pill bottles with Price’s name on them, paperwork with Price’s name on it, and Price’s clothing were found in the bedroom. Moreover, the government also introduced the certificate of completion for a handgun safety course as evidence that Price knowingly possessed the firearms.

The defense objected to the admission of the certificate and argued that it “would be evidence of another criminal offense”—i.e., Price’s unlawful possession of the Glock pistol two weeks prior to the execution of the search warrant. However, the government responded that the certificate shows “knowing possession or proof of residency.” The district court admitted the certificate after concluding it was not “other acts” evidence. The district court ruled that the certificate was “strong circumstantial evidence that Price owned and/or possessed the firearms at issue.”

Price was convicted and sentenced to a lengthy term of incarceration. On appeal, Price claimed that the certificate was “other acts” evidence that he possessed a firearm during a handgun safety course two weeks before the search warrant was executed. Consequently, in assessing the admissibility of the certificate, Price maintained that the district court erred by not applying the three-prong test that is used to determine whether evidence is admissible under Fed. R. Evid. 404(b).

In order to determine whether evidence should be admitted under Rule 404(b), a trial court must first determine whether there was sufficient evidence that the “other act” occurred. Next, the trial court must determine whether the offering party is attempting to prove the “other act” for a purpose other than showing character, such as to show intent or identity. Finally, the trial court must balance

the probative value of the evidence against the danger of unfair prejudice.

The 6th Circuit found that Rule 404(b) only applies to evidence submitted to prove an extraneous “other act.” If the “other act” is probative only of character, then it is inadmissible. However, if the “other act” is probative of something else, such as intent or identity, then it is admissible under Rule 404(b). With this said, Rule 404(b) does not apply to evidence that itself is probative of the crime charged, without regard to whether an “other act” occurred.

In this case, the district court concluded that the certificate was circumstantial evidence that Price possessed the firearms and ammunition found during the search, regardless of whether Price possessed a different firearm two weeks prior. Under Tennessee law, the filing of this certificate is a prerequisite to obtaining a handgun carrying permit. Moreover, the proximity of the certificate to the firearms and ammunition found during the search was relevant to proving the crime charged. Consequently, the 6th Circuit held that the district court did not abuse its discretion in determining that the certificate was not subject to exclusion under Rule 404(b).

United States v. Lineback, —F.3d—, 2003 WL 21241804 (6th Cir. 2003).

In February 2001, Lineback was charged with two offenses involving child pornography and inappropriate sexual contact with children. On August 14, 2001, with the assistance of his retained counsel, Dennis Johnson, Lineback pled guilty pursuant to a plea agreement that he reached with the government.

On September 27, 2001, Lineback moved to dismiss Johnson as his attorney and new counsel was appointed. In November 2001, Lineback moved to withdraw his guilty plea on the grounds that he: (1) was dissatisfied with Johnson; (2) felt pressured into pleading guilty by Johnson; (3) did not have adequate time to reconsider the consequences of his plea; and (4) desired to pursue his innocence at trial. The district court denied Lineback’s motion, sentence was imposed, and he appealed the denial of his motion to withdraw his guilty plea to the 6th

Circuit.

Fed. R. Crim. P. 32(e)(1) provides, in pertinent part, that “if a motion to withdraw a guilty plea. . . is made before the sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason.” The aim of this rule is to allow a hastily entered plea made with unsure heart and confused mind to be undone, not to allow a defendant to make a tactical choice to enter a plea, wait several weeks, then obtain a withdrawal if he believes he made a bad choice in pleading guilty.

In determining whether a defendant should be permitted to withdraw his guilty plea, a court will look to the following seven factors: (1) the amount of time that elapsed between the plea and the motion to withdraw it; (2) the presence (or absence) of a valid reason for the failure to move for withdrawal earlier in the proceedings; (3) whether the defendant has asserted or maintained his innocence; (4) the circumstances underlying the entry of the guilty plea; (5) the defendant’s nature and background; (6) the degree to which the defendant has had prior experience with the criminal justice system; and (7) potential prejudice to the government if the motion to withdraw is granted.

In denying Lineback’s motion to withdraw his plea, the district court identified these seven factors. Moreover, in making this decision, the district court relied heavily on the prejudice that the government would suffer if the guilty plea was withdrawn because the minor victims were already apprised that they would not be needed to testify. In the eyes of the district court, to reverse course and allow the plea to be withdrawn would subject the victims to unnecessary anxiety.

On appeal, Lineback maintained that in denying his motion to withdraw his guilty plea, the district court’s consideration of prejudice to the victims was a misapplication of the law. The 6th Circuit did not determine whether prejudice to a crime victim was a factor that could be considered in determining whether to allow a defendant to withdraw his guilty plea. Instead, the 6th Circuit merely concluded that the district court’s determination that anxiety suffered by the

victims would result in prejudice to the government was not clearly erroneous. Accordingly, the district court did not abuse its discretion in denying Lineback's motion to withdraw his guilty plea.

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